Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

MARK ALBRECHT; DIANE ALBRECHT, Both individually and on behalf of others similarly situated,
Petitioners,

v.

BRIAN TREON, M.D., Individually and in his official capacity as Coroner of Clermont County, Ohio, and on behalf of others similarly situated; BOARD OF COUNTY COMMISSIONERS OF CLERMONT COUNTY, OHIO, for itself and on behalf of others similarly situated; MARY WALKER, in her capacity as commissioner of Clermont County, Ohio, and on behalf of others similarly situated; BOB PROUD, in his capacity as commissioner of Clermont County, Ohio, and on behalf of others similarly situated; SCOTT CROSWELL, in his capacity as commissioner of Clermont County, Ohio, and on behalf of other similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the fundamental structure and principles of federalism prevent a federal court from retroactively applying a state supreme court determination –that under state law next of kin have no "legitimate claim of entitlement" in the human body parts of their deceased loved ones for burial post autopsy –where the federal court previously announced that such interest exists and found that it rose to the level of a legitimate claim of entitlement protected by the Fourteenth Amendment?

Whether the question specifically left open in *Stop the Beaches* –should a ***judicial*** decision which eliminates an established property right be analyzed under general due process principals or under the Takings Clause –be answered per the *Stop the Beach* 4 member plurality (Takings Clause) or per the dissent (general due process)?

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SUMMARY

In *Stop the Beach* this court dealt with the common issue of so called judicial taking of property. The court split and did not answer the key question—which Justice Breyer said should be "left for another day"—whether judicial takings are properly analyzed under the general due process clause or the Takings Clause.

The court also did not answer the thorny issue whether determination of state law on the ***existence*** of a property right in the first instance, to trigger Fourteenth Amendment analysis, must be made by a state court or can properly be made by a federal court under *Erie v. Tompkins*.

This case presents those issues in the context of a fundamental aspect of one of the most basic human rights—the burial or cremation of your dead family member ("sepulcher"). It questions whether a federal circuit court which found a protectable property interest in next of kin for sepulcher after autopsy may retroactively apply a later state supreme court decision abolishing that right.

OPINIONS BELOW

The relevant opinions in this matter were issued by the U.S. District Court in *Albrecht v. Tryon, Albrecht v. Treon*, 2007 U.S. Dist. LEXIS 18613 (S.D. Ohio Mar. 16, 2007), by the U.S. Sixth Circuit in *Albrecht v. Treon*, Case No. 09-3703, 2010 FED App. 0260P, 2010 U.S. App. LEXIS 17659 (6th Cir. 2010), and by the Ohio Supreme Court in *Albrecht v. Tryon*, 118 Ohio St.3d 348 (2008), 2008-Ohio-2617.

JURISDICTIONAL STATEMENT

Petitioners respectfully requests this Court to grant their petition for a Writ of Certiorari to review the Sixth Circuit's decision in *Albrecht v. Treon,* Case No. 09-3703, 2010 FED App. 0260P, 2010 U.S. App. LEXIS 17659 (6th Cir. 2010) which was decided on August 24, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions in the suit are:

Amendment 14, U.S. Constitution

> 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 5, U.S. Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

> danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. §1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners brought this action in the United States District Court for the Southern District of Ohio, on behalf of themselves and others similarly situated, pursuant to 42 U.S.C. Section 1983 which provides redress for the violation of rights secured by the

Constitution and laws of the United States. Petitioners' claim was that the Coroner of Clermont County, Ohio, violated Petitioners' protected rights when he destroyed their son's brain, following autopsy and after it was admittedly no longer needed by the Coroner. The Coroner provided no notice to Petitioners that their son's brain had been retained when the rest of their son's remains were released to Petitioners and did not afford Petitioners the opportunity to direct the disposition of their son's brain in accordance with their personal and religious beliefs. It is admitted that no state interest was served by destroying the brain rather than returning it.

Prior to this action, the Sixth Circuit had determined in *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991) that the aggregate of rights granted by the State of Ohio to the next of kin rose to the level of a federally protected "legitimate claim of entitlement" in the body of a deceased loved one, actionable under the U.S. Constitution, 14th Amendment. Despite this, and in the context of protests by the coroner that allowing next of kin their federal rights would subject the government to liability of "millions of dollars," the district court declined to follow *Brotherton* and instead "certified" the already answered question of whether the Petitioners had a constitutionally protected property interest in their son's brain to the Ohio Supreme Court. In a decision criticized in a lead law review article as 'legislation from the bench,' and recently rejected by the New York Supreme Court stating "we decline to follow it" —but rendered in the context of loud cries by defendant of how much liability would "cost"—the Ohio Supreme Court, in 2008, stated that there is no constitutionally

protected interest in the brain after autopsy is complete and the brain is no longer needed by the state. *Albrecht v. Treon*, 118 Ohio St. 3d 348 (2008). This overruled the federal law announced by the Sixth Circuit seventeen years earlier and retroactively destroyed plaintiffs' federally protected rights.

Instead, this Sixth Circuit panel sought to allow the state court to make a pronouncement for the purpose of retroactively overturning vested federal rights. This panel's fiat clearly violated the Sixth Circuit's own internal operating procedure. (6th Cir. I.O.P. 26 which provides that one panel may not unilaterally overrule a prior panel's ruling).

Defendants moved for judgment on the pleadings pursuant to Civ. R. 12(c) on the basis of the Ohio Supreme Court's decision. On May 15, 2009 the District Court granted Defendants' motion for judgment on the pleadings based on the Ohio Supreme Court's answer to the certified question. *Albrecht v. Treon*, Case No. 1:06cv274, 2009 U.S. Dist. LEXIS 44721 (S.D. Ohio, May 15, 2009).

Petitioners appealed the trial court's decision on the basis that the case was controlled by the Sixth Circuit's decisions in *Brotherton* and W*haley v. County of Tuscola ex rel. Tuscola County Bd. of Comm'rs*, 58 F.3d 1111 (6th Cir. 1995). On August 24, 2010 the Sixth Circuit panel affirmed the district court decision.

STATEMENT OF FACTS AND ISSUES

At the outset, it is repeated that this suit made no challenge to the coroner's performance of the autopsy, removal of the brain and other organs for forensic

exam, or retention of the body and the brain for as long as needed to complete the autopsy and maintain evidence. The challenge was solely to the retention and destruction of the brain without notice, after there was admittedly no longer any governmental interest in it.

Petitioners Mark Albrecht and Diane Albrecht, plaintiffs below, were the parents of Christopher Albrecht, who is deceased. His death occurred while *Brotherton* was, in the words of the U.S. Court of Appeals, the "law of this Circuit."

The defendant Coroner took possession of his body and performed an autopsy. Although the body was returned to his parents for burial, Christopher Albrecht's brain was not. The brain was removed for testing and then after testing, destroyed. The coroner never informed Petitioners that he had retained their son's brain when his body was released to them. As a result, Petitioners buried their son without all of his body parts, and without any notice from Defendants of that fact. Petitioners never gave consent or permission to Defendants to keep their son's brain or to destroy it as "waste."

The brain is a crucial part of the body for burial purposes and Petitioners were deprived of their right to receive the brain for interment and humane disposition in accordance with their personal and religious beliefs. It is this conduct, not the retention of the brain for examination, which violated Petitioners' protected interest in the remains of their deceased loved one.

Christopher Albrecht's brain was not the only organ removed and examined during the autopsy, but

the others were returned. The only difference was that the brain takes longer to examine, so it was administratively "inconvenient" to return it and so the coroner did not, even though *Brotherton* was the state of federal law.

With regard to the rights of the next of kin to possess the remains of their next of kin for disposition in accordance with their personal and religious beliefs, the short delay required for the examination of the brain is no valid basis for distinguishing Christopher's brain from his body generally or from the other organs which were returned to Petitioners once their examination was completed. No interest of the state would have been impaired by releasing Christopher's brain for disposition as directed by his parents once its examination had been completed, just as had been done with Christopher's body and other organs.

Petitioners brought this action on behalf of themselves and others similarly situated in United States District Court for the Southern District of Ohio pursuant to 42 U.S.C. Section 1983 against the Coroner of Clermont County, Ohio, and against the Board of Commissioners of Clermont County.[1] Petitioners' claim rested on the Sixth Circuit's decisions in *Brotherton* and *Whaley*.

In *Brotherton*, where the coroner had removed and failed to return the corneas of the deceased, the Sixth Circuit looked at the rules and understandings related to the remains of decedents in Ohio and concluded at

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[1] Petitioners also sought to certify a class of defendants comprised of the coroners of the other counties in Ohio.

923 F.2d 482 that "the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment." This legitimate claim of entitlement in the body covered the corneas in *Brotherton* as it covers the brain in the instant case.

The Sixth Circuit in *Whaley*, 58 F.3d at 1114 (another case of coroner failure to return body parts after autopsy) recognized *Brotherton* as "the law of this Circuit" on the interest of next of kin in the remains of their deceased loved ones ("[b]ecause *Brotherton* is the law of this Circuit, our decision in the present case turns on a comparison of Ohio and Michigan law"). The Circuit reiterated that there is a federally protected right which is violated when a coroner fails to return a body part to the next of kin.

The Sixth Circuit then reached the same conclusion in *Collins v. Crabbe*, 1999 U.S. App. LEXIS 533 (6th Cir. 1999) ("this court has twice, in somewhat analogous circumstances, held that under the law of states other than Tennessee, a plaintiff had a constitutionally protected property interest in the body of a deceased next-of-kin. See *Whaley v. County of Tuscola*, 58 F.3d 1111, 1115-16 (6th Cir. 1995); *Brotherton v. Cleveland*, 923 F.2d 477, 480 (6th Cir. 1990)"); as did the court in *Workman v. Levy*, Case No. 3:01-0296, (M.D. Tenn., May 15, 2007) (where the court noted, citing *Whaley,* as well as *Brotherton* and *Collins,* that "[t]he Sixth Circuit Court of Appeals has recognized a constitutionally protected property interest in the body of a deceased next-of-kin").

Notwithstanding this precedent, the panel which decided the instant case departed from the law of the Circuit. It is that issue which presents the basis for this request for certification to this U.S. Supreme court.

The panel stated that this case was distinguishable from *Brotherton* and *Whaley* because Christopher's brain was 'retained by the state of Ohio for criminal investigation purposes.' However, every autopsy is a "legitimate forensic investigation" – if not, the Coroner would have no right whatsoever to take the body parts in the first place. That is a pseudo-distinction without a difference.

But Petitioners' claim was not about the state's police power right to conduct an autopsy or the right to remove their son's organs for examination during that procedure. Those state interests take precedence over the Petitioners' interest in their son's remains while the remains are needed for forensics or evidence. But after the brain was no longer needed for examination, Petitioners had a right to direct its disposition. No interest of the state would be impaired by releasing Christopher's brain for disposition as directed by his parents once its examination had been completed, just as had been done with Christopher's body and other organs.

Specifically, Petitioners were entitled to notice that their son's brain was retained for examination and an opportunity to direct the disposition of all of their son's remains in accordance with their personal and religious beliefs. No such notice or opportunity was provided. Petitioners' had a protected interest in Christopher's remains such that they were entitled to

notice and the right to dispose of them in accordance with their personal and religious beliefs. (Ohio law even requires the Coroner give notice to next of kin and listing of personal property of the deceased [Ohio Revised Code § 313.14)

May a federal court make a determination, under *Erie*, of the state law question of the existence of protectable right for purposes of subsequent federal 14th Amendment analysis?

In *Stop The Beach Renourishment, Inc., v. Florida Dep't Of Envir. Protection*, ___ U.S. ___, 130 S. Ct. 2592, 177 L. Ed. 2d 18, at 2608 this court explained:

> [W]e make our own determination, without deference to state judges, whether the challenged decision deprives the claimant of an established property right. That is unsurprising because it is what this Court does when determining state-court compliance with *all* constitutional imperatives. We do not defer to the judgment of state judges in determining whether, for example, a state-court decision has deprived a defendant of due process or subjected him to double jeopardy.

But 14th Amendment analysis is, first, based on the existence of a property interest at state law. This court explained that on that issue, a federal court will "accept the determination of the state court." Pg. 2608. What if that decision has previously been made by a federal court sitting in diversity, or acting based on *Erie*?

The Sixth Circuit in *Brotherton* not only decided the federal question of whether the underlying property interest was protected, it also evaluated the bundle of rights Ohio law afforded the next of kin, and determined that that bundle was "property" for Fourteenth Amendment purposes and protected by federal due process.

This appeal posits that it is perfectly appropriate for a federal court to make such a determination. Federal courts have independent jurisdiction in the administration of state laws. It is the right and duty of the federal courts to exercise their own judgment as to the meaning and effect of those laws. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 359 (1910). The jurisdiction of federal court in this regard is coordinate with, and not subordinate to, that of the state courts. Id. As this Court explained in *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) "it is the duty of the [federal court] in every case to ascertain from all the available data what the state law is and apply it * * * ."

The tension present by the present appeal, and one of the issues requiring clear guidelines is a state court subsequently seeking to "overrule" such a federal decision, not prospectively but retroactively. The Ohio Supreme Court, when faced with a class action lawsuit against the coroners[2] of 87 of the 88 counties[3] in Ohio, with the stroke of a pen 'overruled' the Sixth Circuit's

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[2] Strictly speaking, Summit County has a medical examiner rather than a coroner.

[3] Hamilton County previously settled a suit on this basis and was not named in this action.

decision in *Brotherton*. The Ohio Supreme Court did so by the simple expedient of purporting to decree that there is, going forward, no interest in the next of kin under Ohio law[4], but also that there 'never had been.' A state court may dictate the contours and existence of what is property under its laws, but it may not dictate what federal protections are afforded to property already held as such by a federal court acting within its jurisdiction.

The Sixth Circuit panel had no right to 'defer' to the Ohio Supreme Court to insulate its coroners from liability under 42 U.S.C. 1983. When the Sixth Circuit purported to allow the Ohio Supreme Court to make its own determination of what the *federal law* in the Sixth Circuit was on this issue, it violated the fundamental principles of federalism. This is a frontal attach on federalism and creates a hole in the balloon which undermines all confidence in the Supremacy of the law.

The Decision of the District Court

On May 15, 2009 the trial court granted Defendants' motion for judgment on the pleadings as to Petitioners' federal claims and dismissed all of Petitioners' state law claims. The court concluded

> The Supreme Court of Ohio decided in *Albrecht v. Treon* that next of kin did not have any

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[4] In part the Ohio Supreme Court's decision was based on the enactment of R.C. 313.123 effective on August 17, 2006. R.C. 313.123(B) declares specimens retained by a coroner to be medical waste. Pursuant to R.C. 1.48 R.C. 313.123 has only prospective application, and does not apply to Petitioners' claims.

> constitutionally cognizable interest in the autopsy specimens of the decedent that were removed and retained by the coroner for forensic examination and testing. Defendants therefore are entitled to judgment on Plaintiffs' federal law claims. The Court declines to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims. *Albrecht v. Treon*.

The Decision of the Sixth Circuit

On appeal the Sixth Circuit affirmed the trial court's decision granting Defendants' motion for judgment on the pleadings. The Sixth Circuit concluded that the district court "appropriately deferred to the Ohio Supreme Court's interpretation of Ohio law in finding that the Albrechts did not have a property interest in the son's body parts the coroner retained for investigative purposes." *Albrecht v. Treon*, 2010 FED App. 0260 P, page 9.

REASONS FOR GRANTING THE PETITION

The District Court certified a question to the Ohio Supreme Court concerning the property interests of a next of kin in the remains of their deceased loved ones. Petitioners objected on the basis that, under the circumstances of this case, certification violated the fundamental principles of federalism because it afforded the Ohio Supreme Court the opportunity to retroactively eliminate a vested substantive right that the Sixth Circuit had declared under federal law. With no surprise, and given the green light by the panel of the Sixth Circuit, the Ohio Supreme Court neutered 42 U.S.C. §1983 and concluded that "nothing

in the United States Constitution, the Ohio Constitution, Ohio statutes, or common law establish a protected right in autopsy specimens in Ohio." This "end-run" procedure allows state courts to create their own immunity by overruling prior federal law.

1. Where it has previously been decided as the law of the Sixth Circuit that Ohio law affords the next of kin an interest in the remains of their deceased loved ones, fundamental principles of federalism prevent a federal court from deferring to a subsequent state supreme court determination to the contrary.

Both the majority and the dissent in the Ohio Supreme Court's answer to the question certified by the trial court recognized that the issue was whether the "state law in effect at the time of the incident gave them a property interest in their deceased son's body parts." *Albrecht v. Treon*, 118 Ohio St. 3d at 351; 118 Ohio St. 3d at 359, Pfeifer J., dissenting. However, the Sixth Circuit had already made a determination that the bundle of rights Ohio recognized in the remains of a deceased amounted to a "legitimate claim of entitlement" in the next of kin. That was the law of the Sixth Circuit in effect at the time of the incident which gave rise to Petitioners' claims. And that law gave the Petitioners a 14th Amendment interest in their son's body parts. Fundamental principles of federalism prevent the Ohio Supreme Court from making an ex post facto determination that not only overrules the Sixth Circuit but also destroys a vested right.

In the context of a 42 U.S.C. §1983 action, it is fully appropriate for the federal court to conduct the analysis of the substantive nature of the interest created by the state. The Sixth Circuit has already made that evaluation of Ohio law, and concluded that under Ohio law there is a property interest in the remains of a deceased loved and that that interest is protected by the Fourteenth Amendment.

Federalism is often viewed from the perspective of the states—"there is a 'special deference owed to state law and state courts in our system of federalism, * * *.'" *Thomas v. Am. Home Prods.*, 519 U.S. 913, 917 (1996), Rehnquist, C.J., dissenting. But, as the court recognized in *Ark. Chronicle v. Easley*, 321 F. Supp. 2d 776, 790-791 (E.D. Va., 2004) rev'd on other grounds, *Ark. Chronicle v. Murphy*, 183 Fed. Appx. 300 (4th Cir. 2006), "federalism is a two-way street founded upon mutual respect between federal and state courts."

As Justice Kennedy explained in his concurring opinion in *United States Term Limits v. Thornton*, 514 U.S. 779, 838 (1995)

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. (Emphasis added.)

It is the "each protected from incursion by the other" aspect which is operative here, because with regard to federal rights, as noted by this Court in *Dennis v. Higgins*, 498 U.S. 439, 450 (1991), the Supremacy

Clause ""secure[s] federal rights by according them priority whenever they come in conflict with state law.'" In *Howlett v. Rose*, 496 U.S. 356, 371 (1990), this Court explained that "the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." The Supremacy clause, as the court in *Legal Environmental Assistance Found. v. Pegues*, 904 F.2d 640, 643-644 (11th Cir. 1990) noted, "states a fundamental structural principle of federalism."

The Sixth Circuit's decision to 'defer' to the Ohio Supreme Court violates the most fundamental structural principle of federalism. It allowed the Ohio Supreme Court to "dissociate [itself] from federal law" and make its own determination about whether Ohio state agencies are complying with federal law, a determination that is ultimately vested in the federal courts. When given the legal opportunity what state would not grant themselves immunity? In earlier years, one can imagine if a federal court "deferred" to the Mississippi Supreme Court as to whether lynching violated a black citizen's due process right.

It is clearly the province of federal courts decide federal law. As this Court long ago held in *Marbury v. Madison*, 5 U.S. 137, 177 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is." With respect to the issue at hand, the court in *Abbeville Gen. Hosp. v. Ramsey*, 3 F.3d 797, 804 (5th Cir. 1993) explained that "general principles of federalism, * * * do not permit states to be final arbiters of their compliance with federal law." This Court reached a similar conclusion in *Howlett v. Rose*, 496 U.S. at 366 when it observed that a state

court's construction of immunity "raise[d] the concern that the state court may be evading federal law and discriminating against federal causes of action."

And that is exactly the result of the Sixth Circuit's action in this case. The Ohio Supreme Court became the final arbiter of the coroners' compliance with pre existing and announced federal law.

2. Where it has previously been decided as the law of the Circuit that Ohio law affords the next of kin an interest in human remains of their deceased loved ones, a state supreme court cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property interest it has taken never existed at all.

The Sixth Circuit's 1991 determination that Ohio's rules and understandings with respect to the next of kin's interest in the remains of their deceased loved ones rose to the level of a "legitimate claim of entitlement" was the law of the Sixth Circuit at the time petitioner's rights were violated. The Ohio Supreme Court cannot retroactively abolish that in 2008.

The clearly established law of the Sixth Circuit at the time Christopher's brain was removed, retained, and destroyed gave Petitioners a federal cause of action for the violation of their interest in Christopher's human remains. *Brotherton* gave Petitioners an existing right, a right which was not abridged until the Ohio General Assembly changed the

law after Petitioners filed suit. That is totally proper, but Petitioners' cause of action accrued long before that new statute was enacted. Petitioner's cause accrued when Christopher's brain was disposed of as medical waste and gave Petitioners a vested right. As Justice Stevens put it in his concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 295-297 (1967) "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." But that is what the Ohio Supreme Court did.

However, a further unanswered question presented by this case is one pinpointed in *Stop the Beach*. Does the fact that the property or quasi property right in this matter is being eliminated by judicial decree and not legislative action make a difference? As this court said at 2606, in cases of this type "[w]e are talking here about judicial elimination of established private property rights.

In *Richards v. Jefferson County*, 517 U.S. 793, 804 (1996), citing *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681-682 (1930) this Court explained that "[w]hether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Yet the same question repeated in *Stop the Beach* and still remains unclear as to its rules and requirements. This court announced at 2602,

> If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less [***24] than if the State had physically appropriated it or destroyed its value by regulation.

But is the answer governed by the Takings clause or the general due process clause? Four members of this court used the general due process clause to address the question in Stop the Beach, but other Justices disagreed, and asserted at 2615:

> Given that the constitutionality" of a judicial decision altering property rights "appears to turn on the legitimacy" of whether the court's judgment eliminates or changes established property rights "rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the *Takings Clause*.

This is extremely significant in all cases of this type, and such cases are becoming too common. Lacking political force to enact legislation to obtain a certain result, interest groups turn to the court to accomplish their goal by judicial legislation. Courts are not designed for this task, and the mischief is compounded under the 'free for all' rubric of 'substantive due process' where 'the law is whatever I say it is.' Such touchstone is the genesis of "activist courts."

The tension on this issue and the immediate need for guidance is illustrated plainly by the parry and

thrust of the differing members of this court in the multiple opinions in *Stop the Beach*.

> The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is "arbitrary or irrational" under the Due Process Clause.

Pg. 2615

> The judiciary historically has not had the right or responsibility to say what property should or should not be taken.

Pg. 2616

> I cannot join Parts II and III, however, for in those Parts the plurality unnecessarily addresses questions of constitutional law that are better left for another day.

Pg. 2618

> [T]he approach the plurality would take today threatens to open the federal court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges. And the failure of that approach to set forth procedural limitations or canons of deference would create the distinct possibility that federal judges would play a major role in the shaping of

> a matter of significant state interest -- state property law.

Pg. 2619

The Sixth Circuit allowed the Ohio Supreme Court to determine not just what the law *is* in Ohio with regard to the rights of the next of kin in the remains of their deceased loved ones, but what the law *was* at a point of time in the past, a point in time when the Sixth Circuit had already determined that the next of kin in Ohio had an interest protected by the Fourteenth Amendment. Deference to that determination deprives Petitioners of an opportunity to defend their substantive rights as articulated by the Sixth Circuit.

The Ohio Supreme Court's analysis was necessarily colored by not only the Sixth Circuit's decision in *Brotherton* but also by the potential liability of all Ohio coroners. The Sixth Circuit's deference to the Ohio Supreme Court allows the Ohio Supreme Court to go back in time and overrule Sixth Circuit precedent, thereby allowing the Ohio Supreme Court, rather than the federal courts, to determine Ohio's compliance with federal law.

Should this approach be allowed. Under traditional takings analysis, this outcome would not survive. Under broader due process analysis, the question is a free for all. The duty of federalism would require that this result not be allowed, but the Sixth Circuit missed that boat in favor of letting the state judiciary 'find its way.' But the state judiciary must, first and foremost, comply with the U.S. Constitution. It did not, by

ignoring federal governing law in favor of an outcome driven ruling.

> Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.
>
> It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon

Monongahela Navigation Co. v. United States, 148 U.S. 312, 325-326 (U.S. 1893)

3. The principles of stare decisis and the precedent and local rules of the Sixth Circuit prevent a panel of the Circuit from rendering a decision which overrules a prior reported decision of the Circuit holding that Ohio law affords the next of kin an interest in the remains of their deceased loved ones.

Finally, this case raises an area of critical responsibility assumed by this Honorable court. Under the law of the Sixth Circuit at the time at issue under *Brotherton* and *Whaley* Petitioners had a clearly established right to direct the disposition of Christopher's brain after it was no longer needed for examination. There is no valid basis for distinguishing *Brotherton* and *Whaley* from this case. Petitioners have the right to have their case judged on its merits under the law that was in effect at the time the conduct at issue occurred.

The failure of the panel in this case to follow *Brotherton* and *Whaley* violates the principles of stare decisis and the precedent and local rules of the Sixth Circuit.

First, a panel of the Sixth Circuit may not overrule prior reported decisions of the Sixth Circuit—*Brotherton* and *Whaley*. The court in *Salmi v. Secretary of Health & Human Services*, 774 F.2d 685, 689 (6th Cir. 1985) explained that

> A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.

Such a result is also in direct contravention of the Circuit's own rules. Sixth Circuit I.O.P. 206 provides that a panel may not overrule a prior, published Circuit decision:

> (c) **Published Opinions Binding.** Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.

The panel's decision in this case violates both Circuit's decisional precedent and the Circuit's local rules.

This court has supervisory responsibility on violations of the principle of stare decisis. As this

court explained in *Randall v. Sorrell*, 548 U.S. 230, 243-244 (2006) "[t]he Court has often recognized the 'fundamental importance' of stare decisis, the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody." This is so because, as the *Randall* court observed "stare decisis 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" As a result, "[s]tare decisis thereby avoids the instability and unfairness that accompany disruption of settled legal expectations." Id. Yet that is exactly what the decision here appealed from does. As noted above, Petitioners had more than settled legal expectations, they had a vested right in an accrued cause of action. And deference to the Ohio Supreme Court's ex post facto determination unfairly disrupts Petitioners' settled legal expectations.

This Court noted in *Dickerson v. United States*, 530 U.S. 428, 437 (2000) that "The law in this area is clear. This Court has supervisory authority over the federal courts * * * ."

In *Hollingsworth v. Perry*, 130 S. Ct. 705, 713 (2010) this Court recently explained that "[t]his Court also has a significant interest in supervising the administration of the judicial system." Accordingly, one of the "Considerations Governing Review on Certiorari" outlined in Sup. Ct. R. 10(a) is whether "a United States court of appeals * * * has so far departed from the accepted and usual course of judicial proceedings * * *as to call for an exercise of this Court's supervisory power."

The decision that is the subject of this Petition is such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. The decision violates both the precedent and the local rules of the Sixth Circuit. The decision also violates the fundamental principle of stare decisis. Most important, it raised a question about a key issue life, the rights of the next of kin to respectful disposition of the remains of their loved ones. Is an infringement in that context governed by the due process clause, by substantive due process, or by the Takings Clause?

This Court should grant petitioner's petition for a Writ of Certiorari.

CONCLUSION

For the reasons set forth herein Petitioners respectfully request this Court grant their Petition for a Writ of Certiorari.

Respectfully Submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-3703

[Filed August 24, 2010]

MARK ALBRECHT; DIANE ALBRECHT, Both individually and on behalf of others similarly situated, *Plaintiffs-Appellants*,	)
v.	)
BRIAN TREON, M.D., Individually and in his official capacity as Coroner of Clermont County, Ohio, and on behalf of others similarly situated; BOARD OF COUNTY COMMISSIONERS OF CLERMONT COUNTY, OHIO, for itself and on behalf of others similarly situated; MARY WALKER, in her capacity as commissioner of Clermont County, Ohio, and on behalf of others similarly situated; BOB PROUD, in his capacity as commissioner of Clermont County, Ohio, and on behalf of others similarly situated; SCOTT CROSWELL, in his capacity as commissioner of Clermont	)

County, Ohio, and on behalf of others similarly situated,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 06-00274—Susan J. Dlott, Chief District Judge.

Argued: August 6, 2010

Decided and Filed: August 24, 2010

Before: GUY and GRIFFIN, Circuit Judges; HOOD, Senior District Judge.*

COUNSEL

ARGUED: John Henry Metz, LAW OFFICE, Cincinnati, Ohio, for Appellants. H. Elizabeth Mason, CLERMONT COUNTY PROSECUTOR'S OFFICE, Batavia, Ohio, for Appellees. **ON BRIEF:** John Henry Metz, LAW OFFICE, Cincinnati, Ohio, Patrick J. Perotti, DWORKEN BERNSTEIN CO., LPA, Painesville, Ohio, for Appellants. H. Elizabeth Mason, CLERMONT COUNTY PROSECUTOR'S OFFICE, Batavia, Ohio, for Appellees. Mark D. Landes, David G. Jennings, Jennifer H. George, ISAAC, BRANT, LEDMAN & TEETOR, Columbus, Ohio, David G. Lambert, Paul J. Cristallo, Frederick W. Whatley,

* The Honorable Joseph M. Hood, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

CUYAHOGA COUNTY PROSECUTOR'S OFFICE, Cleveland, Ohio, for Amici Curiae.

OPINION

HOOD, Senior District Judge. Plaintiffs-Appellants Mark and Diane Albrecht, et al. ("the Albrechts") appeal the district court's decision to grant judgment on the pleadings in favor of Defendants-Appellees Brian Treon, et al. (hereinafter, "Defendants"). The Albrechts brought a claim pursuant to 42 U.S.C. § 1983, alleging that they were denied due process of law when the defendant coroner performed an autopsy on the Albrechts' son's remains and removed the brain during the procedure. When the body was returned to the Albrechts, they were not informed that the coroner had retained the brain for further study and that it would be destroyed once the investigation was complete. The Albrechts claim that the retention and destruction of their son's brain, without their knowledge, deprived them of the right to dispose of their son's brain, in violation of the Due Process Clause of the Fourteenth Amendment. The Albrechts base this claim on their purported property interest in their son's entire body, including his brain. The Albrechts also brought common law tort claims against Defendants, over which the district court exercised supplemental jurisdiction.

The district court was faced with the question of whether the Albrechts had a constitutionally protected property interest in their son's brain after it was removed and retained for legitimate investigative purposes. As this was a question of first impression in Ohio, the district court certified the question to the Ohio Supreme Court. The Ohio Supreme Court

answered the question in the negative, stating that there is no constitutionally protected property interest in human remains retained by the state of Ohio for criminal investigation purposes. The district court consequently held that the Albrechts had no property interest in the brain, and, thus, Defendants were entitled to judgment on the pleadings. The Albrechts argue that the Sixth Circuit's ruling in *Brotherton v. Cleveland, M.D.*, 923 F.2d 477 (6th Cir. 1991), holding that a spouse had a protected property interest in her husband's corneas, which were removed for donation purposes, should rule this case, as opposed to the Ohio Supreme Court's answer to the certified question.

For the reasons which follow, the judgment of the district court is **AFFIRMED**.

I. Factual and Procedural Background

The coroner for Clermont County, Ohio, performed an autopsy on the Albrechts' son's remains. The autopsy required examination of their son's brain. In order to examine and dissect a human brain more effectively, the jelly-like organ must be soaked in a formol saline solution for ten to fourteen days, a process referred to as "fixing" the brain, which firms the brain tissue for dissection. Due to the lengthy process of fixing the brain, it is the usual practice of the coroner to return the remains to next of kin for disposition without the brain. The coroner did not inform the Albrechts that he retained their son's brain upon return of the body to them. When the examination of the brain was completed, it was destroyed in accordance with the coroner's usual practice. The coroner did not notify the Albrechts that the brain was going to be destroyed. The Albrechts

learned that their son's body was missing the brain when they received the autopsy report months later, long after burying their son. The Albrechts filed suit, claiming a violation of the Due Process Clause of the Fourteenth Amendment and common law tort liability. The suit was certified as a class action, and the Albrechts represent a class of similarly-situated plaintiffs whose deceased family members' bodies were returned to them missing tissues or organs that the coroner retained for further study in the course of a criminal investigation.

II. Standard of Review

"Motions for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) are analyzed under the same de novo standard as motions to dismiss pursuant to Rule 12(b)(6)." *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295 (6th Cir. 2008). Courts "must construe the complaint in the light most favorable to plaintiff," *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citation omitted), "accept all well-pled factual allegations as true[,]" *id.*, and determine whether the "complaint states a plausible claim for relief[,]" *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009). However, the plaintiff must provide the grounds for its entitlement to relief, *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 361 (6th Cir. 2001), and that "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949.

A plaintiff falls short if she pleads facts "merely consistent with a defendant's liability" or if the alleged facts do not "permit the court to infer more than the mere possibility of misconduct . . . ." *Id.* at 1949, 1950.

III. Discussion

A. Ohio Supreme Court's Ruling in *Albrecht II*

The Albrechts argue that under *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), and *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995), they had a constitutionally protected property interest in their son's discarded brain. In *Brotherton*, the plaintiff objected to the donation of her deceased husband's organs at the hospital. This objection, however, was not conveyed to the county coroner, who removed the decedent's corneas pursuant to an Ohio statute which "permitted a coroner to remove the corneas of autopsy subjects without consent, provided that the coroner has no knowledge of an objection by the decedent, the decedent's spouse, or . . . the person authorized to dispose of the body." *Brotherton v. Cleveland*, 923 F.2d at 478. We reversed the district court's dismissal of the plaintiff's § 1983 claims, finding that the plaintiff had the right to possession of her husband's body for the limited purpose of lawfully disposing of it. *Id.* At issue in *Brotherton*, however, was part of Ohio's adoption of the Uniform Anatomical Gift Act, which expressly granted next of kin the right to dispose of a relative's

remains.[1] There is no similar statute at issue in this case.

Whaley is a direct progeny of *Brotherton* and arose under similar facts. The plaintiffs in *Whaley* were the next of kin of persons whose bodies were the subject of autopsies and whose corneas or eyeballs were removed, either without the consent of the next of kin, or after the objection of their next of kin. The *Whaley* court held that under Michigan law, "the next-of-kin [have] a legitimate claim of entitlement and thus a property interest in a dead relative's body, including the eyes." *Whaley v. County of Tuscola*, 58 F.3d 1111, 1117 (6th Cir. 1995). The Albrechts maintain that *Brotherton* and *Whaley* control the outcome in this case, arguing that their right to their son's brain is constitutionally equal to the plaintiffs' rights in *Brotherton* and *Whaley* to their relatives' eyeballs or corneas. Defendants claim that *Brotherton* and *Whaley* are distinguishable from the facts in this case, because removal and retention of tissue or organ for donation purposes, as in *Brotherton* and *Whaley*, serve little function for the state, and, thus, the relatives have greater property interest in the body parts. However, removal and retention of tissues or organs for forensic analysis in furtherance of a criminal investigation serves an important state function, which is paramount to the Albrechts' right to possess their son's body in its entirety.

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[1] That statute does not apply here, because this case relates to the rights of a coroner to possess, examine, and dispose of a corpse, not the right of the next of kin to object or consent to organ donation.

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "In order to establish a procedural due process claim, a plaintiff must show that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest." *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006) (citation omitted). Property interests "are defined by existing rules or understandings that stem from an independent source such as state law-rules . . . ." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). "Although property rights are principally created by state law, whether a substantive interest created by the state rises to the level of a constitutionally protected property interest is a question of federal constitutional law. . . . The due process clause only protects those interests to which one has a legitimate claim of entitlement." *Waeschle v. Dragovic*, 576 F.3d 539, 544-45 (6th Cir. 2009).

The issue on appeal is whether the Albrechts had a constitutionally protected property interest in their son's brain after it was removed during the autopsy. As noted above, Ohio state law governs the definition of "property" in Ohio. *Board of Regents of State Colleges v. Roth*, 408 U.S. at 577. Because this was an issue of first impression in Ohio, the district court certified the following question to the Ohio Supreme Court:

> a protected right under Ohio law in the decedent's tissues, organs, blood or other body

> parts that have been removed and retained by the coroner for forensic examination Whether the next of kin of a decedent, upon whom an autopsy has been performed, have and testing.

The Ohio Supreme Court accepted the certified question for review and held that "the next of kin of a decedent upon whom an autopsy has been performed do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing." *Albrecht v. Treon*, 889 N.E. 120, 122;118 Ohio St.3d 348, 350 (2008) (*Albrecht II*).[2] As a result of that answer, the district court held that "[b]ecause Ohio law does not give the next of kin of a decedent upon whom an autopsy has been performed a protected right in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing, Plaintiff's action brought pursuant to 42 U.S.C. § 1983 fails as a matter of law." We agree.

This Court addressed the issue in this case on two previous occasions. Prior to the district court's ruling on the motion for judgment on the pleadings, the Albrechts sought a writ of mandamus directing the district court to withdraw the certification or a writ of prohibition directing the district court not to consider any answer that the Supreme Court might offer to the

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[2] In the relevant case law, the district court case from which this appeal is taken is referred to as "*Albrecht I*" and the Ohio Supreme Court's opinion answering the district court's certified question is referred to as "*Albrecht II*."

certified question. We denied the mandamus petition, stating that "the plaintiffs invoke a holding in a decision issued in another case on a distinguishable set of facts. Since *Brotherton* was decided, changes in Ohio law suggest another reading may be possible." *In re Albrecht*, No. 07-3419, slip op. at 3 (6th Cir. May 2, 2007).

In August 2009, we discussed the case at bar at length in *Waeschle v. Dragovic*, 576 F.3d 539 (6th Cir. 2009). The facts in *Waeschle* are nearly identical to the facts in this case, but *Waeschle* originated in Michigan, not Ohio. Noting the similarities between Michigan and Ohio property law, we stated, "the [Ohio Supreme] Court's decision in *Albrecht II*, which explicitly denied that the next of kin have a right to body parts collected for forensic examination, suggests that such a right would probably not be recognized under existing Michigan law." *Waeschle*, 576 F.3d at 548-9. We held that for the purposes of qualified immunity, "Waeschle's alleged constitutionally protected property right to her mother's brain is [not clearly established,]" but cautioned that it did not "determine the existence or the scope of Waeschle's right to her mother's brain in the present case." *Id.* at 550.

The Albrechts argue that there is a conflict between Ohio state law and the law of this circuit regarding a person's rights to a deceased relative's body parts. The Albrechts further argue that the Ohio Supreme Court decision in *Albrecht II*, holding that next of kin do not have a property interest in autopsy specimens gathered for the purpose of a legitimate investigation, cannot "overrule" the Sixth Circuit decision in *Brotherton*, holding that next of kin do have a

protected property interest in the eyes of deceased relatives, removed for the purpose of donation.

The Albrecht's arguments are flawed. First, the Albrechts confuse the definition of "protected" with the definition of "property." As previously explained above, the states define "property," "property rights," and "property interest." *Board of Regents of State Colleges v. Roth*, 408 U.S. at 577. Whether that "property interest" is constitutionally "protected," however, is a matter of federal law. *Waeschle v. Dragovic*, 576 F.3d at 544-45; *see Brotherton v. Cleveland*, 923 F.2d at 481-82 ("Although the existence of an interest may be a matter of state law, whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the due process clause is determined by federal law."). Thus, there are two questions in determining whether a plaintiff has a constitutionally protected property interest sufficient to support a § 1983 claim: first, is there a property interest, stemming from "an independent source such as state-law rules" and second, whether that interest, if any, "rises to the level of a constitutionally protected property interest." *Board of Regents of State Colleges v. Roth*, 408 U.S. at 577 and *Waeschle v. Dragovic*, 576 F.3d at 544-45. Obviously, if the first question is answered in the negative, the second question is moot. In its holding in *Albrecht II*, the Ohio Supreme Court found that there is no property right to autopsy specimens removed and retained for purposes of a lawful criminal investigation.[3]

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[3] Although the *Albrecht II* court stated that "the next of kin of a decedent upon whom an autopsy has been performed do not have a *protected right* under Ohio law in the decedent's tissues, organs,

The Ohio Supreme Court's decision in *Albrecht II* did not "overrule" Sixth Circuit precedent. *Albrecht II* is a clarification of property law in the state of Ohio. "Principles of comity require federal courts to defer to a state's judgment on issues of state law . . . ." *Israfil v. Russell*, 276 F.3d 768, 771 (6th Cir. 2001). The district court appropriately deferred to the Ohio Supreme Court's interpretation of Ohio law in finding that the Albrechts did not have a property interest in the son's body parts the coroner retained for investigative purposes.

Furthermore, the argument that *Albrecht II* impermissibly "overrules" and conflicts with *Brotherton* is flawed. *Brotherton* is distinguishable

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blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing," the Court merely answered the question using the language the district court used in the question it submitted. *Albrecht II*, 118 Ohio St.3d at 350 (emphasis added). The full language of the opinion makes it clear that the Ohio Supreme Court was determining whether the "state law in effect at the time of the incident gave them a property interest in their deceased son's body parts." *Id.* at 351 (emphasis added)(citation omitted). Furthermore, this Court has already identified and dismissed the district court's misstatement in its denial of the Albrecht's petition for mandamus, stating,

> The plaintiffs also suggest that the district court erred by asking the Ohio Supreme Court whether there is a "protected" interest, rather than a "property" interest. Although the two terms generate some confusion, we are convinced that the district court recognized that there is a state component and a federal component to the plaintiffs' cause of action.

In re Albrecht, No. 07-3419, slip op. at 3 (6th Cir. May 2, 2007).

from the facts in this case, and this Court has already ruled to that extent in *Waeschle*. As noted, the facts in *Waeschle* are nearly identical to the facts in this case. On this issue, this Court stated that

> *Brotherton* and *Whaley*, however, are distinguishable from the present case. The key difference is that the brain of Waeschle's mother was removed and retained for study by the Medical Examiner in furtherance of a lawful criminal investigation. By contrast, the removal of corneas in *Brotherton* and *Whaley* served no investigative function whatsoever. The distinction is important because Waeschle might have no right under Michigan law to possess, control, or dispose of her mother's brain once it is removed for legitimate forensic study.

Waeschle v. Dragovic, 576 F.3d at 546-47. The *Waeschle* court stated that the plaintiff "might have no right" to her mother's brain because the law in Michigan has not been clearly defined on this issue. The Supreme Court of Ohio, however, has clearly defined the law on this issue in Ohio. Furthermore, this Court and the Supreme Court of Ohio agree that *Brotherton* applies only in the narrow circumstance of unauthorized removal of body parts for donations, and should not be expanded to include claims by next of kin for bodily tissues retained by a government official for legitimate criminal investigations. *Id.*; *Albrecht v. Treon*, 118 Ohio St.3d 348, 353 (2008) (*Albrecht II*).

The Albrechts further argue that their position is supported by the district court's decision in *Hainey v. Parrott*, No. 1:02-CV-733, 2005 WL 2397704 (S.D. Ohio Sept. 28, 2005). *Hainey* was a class action lawsuit with

facts nearly identical to those at bar. The district court in *Hainey* found that the

> differences in facts likely to [sic] do not take [that] case outside the broad holding in *Brotherton* that there is a substantial and protectable constitutional interest in the dead body of a relative or loved one.
>
> . . . .
>
> Accordingly, the Court concludes that Plaintiffs do have a cognizable constitutional property interest in their decedent's body parts which the coroner's office violated when it disposed of their decedents' brains without prior notice.
>
> . . . .
>
> . . . *Brotherton* very broadly and very clearly held that family members have a property interest in their decedent's body parts which is protected by the due process clause of the Fourteenth Amendment.

Hainey v. Parrott, No. 1:02-CV-733, 2005 WL 2397704 at *6-8 (S.D. Ohio Sept. 28, 2005). *Hainey* was decided prior to the Ohio Supreme Court's ruling on the certified question in this case. Without the benefit of a ruling from the Ohio Supreme Court on this issue, the district court in *Hainey* utilized the precedent available and made a prediction on Ohio law as defined at that time. *See Combs v. International Ins. Co.*, 354 F.3d 568, 577 (6th Cir. 2004) (Federal courts must make the "best prediction, even in the absence of direct state precedent, of what the [state supreme court] would do if it were confronted with [the]

question."). The district court in *Hainey* did not, and could not, define Ohio property law. The Ohio Supreme Court addressed the *Hainey* case in its opinion on the certified question, stating, "*Hainey's* expansion of *Brotherton* is unsupported by Ohio law." *Albrecht II*, 118 Ohio St.3d 348, 355 (2008). Furthermore, this Court rejected an expansion of *Brotherton* in *Waeschle*. *Waeschle v. Dragovic*, 576 F.3d at 546-47 ("*Brotherton* [is] . . . distinguishable from the present case . . . the removal of corneas in *Brotherton* and *Whaley* served no investigative function whatsoever").

B. Purported Retroactive Application of *Albrecht II*

Finally, the Albrechts argue that because, in their view, *Brotherton* is the controlling law of this case, their rights to their son's brain under *Brotherton* vested prior to the Ohio Supreme Court's decision in *Albrecht II* and to apply *Albrecht II* to this case would be to apply it retroactively. This argument is a red herring. As explained above, this Court does not define Ohio property law. *Brotherton* did not create a property interest in the next of kin's deceased relative's corneas, but, instead, interpreted that right as it already existed pursuant to Ohio's Uniform Anatomical Gift Act. *Brotherton* is distinguishable from this case and does not control the outcome, therefore, *Albrecht II* did not impact the law as set forth in *Brotherton*. Thus, the question of whether *Albrecht II* should be applied retrospectively or

prospectively is inapposite here, because *Albrecht II* did not change Ohio law.[4] As the district court stated,

> *Albrecht* [*II*] did not contradict *Brotherton* or create new law. Rather, the Supreme Court of Ohio illuminated the fact that both before and after *Brotherton*, Ohio law did not grant the entitlement that Plaintiffs claim. Thus, the Court need not undertake an analysis of whether the decision from the Ohio court is entitled to retroactive effect.

Federal law is clear that the states define property rights in their respective jurisdictions. *See Craft v. U.S. Through C.I.R.*, 140 F.3d 638, 645 (6th Cir. 1998) (Ryan, J., concurring) ("state property law determines which rights, in the bundle of rights we call 'property,' a person may exercise."). The Ohio Supreme Court explicitly delineated the lack of property rights in this case in *Albrecht II*. That Court held that next of kin have no right to autopsy specimens removed and retained by the coroner, in furtherance of a criminal investigation. Although there is no dispute as to the facts as the Albrechts present them, they had no

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[4] Both briefs also mention R.C. § 313.123, which states that "retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste and shall be disposed of in accordance with applicable federal and state laws." R.C. § 313.123. This statute was enacted after the incidents which form the basis for this lawsuit, and, thus, is not controlling on the outcome in this case. *Patel v. Gonzales*, 432 F.3d 685, 690 (6th Cir. 2005) ("courts ordinarily do not apply statutes retroactively unless a statute evidences congressional intent to apply retroactively . . . where a statute is silent as to the scope of its application, the statute should not be applied retroactively") (citations omitted).

property interest in their son's brain, thus, they cannot support the first element of a due process clause claim. Their claim fails as a matter of law. "[I]f state actors . . . do not infringe on the life, liberty, or property of the plaintiffs, there can be no due process violation." *Whaley v. County of Tuscola*, 58 F.3d 1111, 1113 (6th Cir. 1995). Here, the Albrechts had no property rights on which the state could infringe. As a result, the district court properly granted judgment on the pleadings in favor of the defendants.

IV. Conclusion

For the foregoing reasons, the district court's grant of judgment on the pleadings in favor of Defendants is **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-3703

[Filed August 24, 2010]

MARK ALBRECHT; DIANE ALBRECHT, Both individually and on behalf of others similarly situated,
Plaintiffs - Appellants,

v.

BRIAN TREON, M.D., Individually and in his official capacity as Coroner of Clermont County, Ohio, and on behalf of others similarly situated; BOARD OF COUNTY COMMISSIONERS OF CLERMONT COUNTY, OHIO, for itself and on behalf of others similarly situated; MARY WALKER, in her capacity as Commissioner of Clermont County, Ohio, and on behalf of others similarly situated; BOB PROUD, in his capacity as Commissioner of Clermont County, Ohio, and on behalf of others similarly situated; SCOTT CROSWELL, in his capacity as Commissioner of Clermont County, Ohio, and on behalf of others similarly situated,
Defendants - Appellees.

Before: GUY and GRIFFIN, Circuit Judges; HOOD, Senior District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.

THIS CAUSE was heard on the record from the district court and was argued by counsel. IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 1:06cv274

[Filed May 15, 2009]

MARK ALBRECHT, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
BRIAN TREON, M.D., et al.,	)
	)
Defendants	)
	)

CHIEF JUDGE SUSAN J. DLOTT

ORDER LIFTING STAY, DENYING MOTION FOR ORAL ARGUMENT, AND GRANTING MOTIONS FOR JUDGMENT ON THE PLEADINGS

Before the Court is the Motion for Judgment on the Pleadings of Defendants Clermont County Coroner and the Board of Commissioners of Clermont County (doc. 93) and the like motion of interested party Lucas County Coroner (doc. 95). Plaintiffs opposed the

motions (doc. 100), and the Clermont County Defendants and other interested party county coroners filed replies in support of Defendants' motion (docs. 104-106). Plaintiffs filed a Request for Oral Argument on Defendants' motions (doc. 107). For the reasons that follow, Plaintiffs' Request for Oral Argument is **DENIED** and Defendants' Motions for Judgment on the Pleadings are **GRANTED**.

I. BACKGROUND

The captioned case is again before this Court having returned from a circuitous course. Plaintiffs filed the lawsuit in this District Court on May 8, 2006, claiming that they were denied due process of law when the county coroner removed and destroyed their son's brain after an autopsy without giving them notice and an opportunity to retrieve the brain for burial. Plaintiffs additionally asserted pendent state common-law tort claims against the Defendants.

The Due Process Clause of the United States Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). In other words, "[r]esolution of the federal issue begins . . . with a determination of what it is that state law provides." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005).

In March 2007, this Court determined that it was unclear whether Ohio law created for the next of kin of a decedent upon whom an autopsy had been performed an interest in the decedent's tissues and organs removed and retained by the coroner for forensic examination and testing. (Doc. 87 at 7.) The Court stayed the case in the District Court and certified the following question of state law for review to the Supreme Court of Ohio:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a protected right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

(Doc. 89.)

Plaintiffs then filed with the Sixth Circuit Court of Appeals a petition for writ of mandamus. In that petition, Plaintiffs argued that the certified question had already been decided in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991). They sought a writ of mandamus directing this Court to withdraw the certification or a writ of prohibition directing this Court not to consider any answer that the Ohio court might offer. The Court of Appeals denied Plaintiff's petition, noting that "the plaintiffs invoke a holding in a decision issued in another case on a distinguishable set of facts. Since *Brotherton* was decided, changes in Ohio law suggest another reading may be possible." *In re Albrecht*, No. 07-3419, slip op. at 3 (6th Cir. May 2, 2007).

The matter then proceeded to the Supreme Court of Ohio, and that court agreed to answer the certified question. Following oral argument by the parties, the Supreme Court of Ohio answered the certified question in the negative, holding as follows:

> The next of kin of a decedent upon whom an autopsy has been performed do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing.

Albrecht v. Treon, 118 Ohio St. 3d 348, 889 N.E.2d 120, syllabus (2008). In its decision, the court first noted that Plaintiffs had argued in the mandamus action that the question already had been decided in *Brotherton*. In response to this argument, the Ohio court explained that *Brotherton* involved Ohio Revised Code Chapter 2180, the Anatomical Gift Act, as it related to the removal of corneas from autopsy subjects for use by eye banks. "Thus, *Brotherton*'s specific holding regarding removal of corneas for purposes unrelated to the autopsy is not relevant in this case." *Id.* at 352. Further, the court explained that the two cases relied upon in *Brotherton*, *Carney v. Knollwood Cemetery Assn.*, 33 Ohio App. 3d 31, 514 N.E.2d 430 (1986) (concerning the unauthorized disturbance of a body) and *Everman v. Davis*, 54 Ohio App. 3d 119, 561 N.E.2d 547 (1989) (concerning the right to bury a decedent), also were not relevant to the issue under consideration. The court also discussed *Hainey v. Parrott*, a factually similar case in which the district court concluded that the plaintiffs had a "cognizable constitutional property interest in their decedent's body parts which the coroner's office violated when it

disposed of their decedent's brains without prior notice." No. 1:02-CV-733, 2005 WL 2397704, at *6 (S.D. Ohio Sept. 28, 2005). The Ohio court stated that the federal district court's expansion of the holding of *Brotherton* "to apply to situations in which the coroner removed and retained organs for additional forensic examination and testing, a procedure that the coroner is clearly authorized by statute to do," was unsupported by Ohio law. *Albrecht*, 118 Ohio St. 3d at 355.

Having determined that *Brotherton* did not answer the certified question, the Supreme Court of Ohio turned to the Ohio statutes. The court first observed that after the federal district court's decision in *Hainey*, the Ohio legislature enacted Ohio Revised Code § 313.123, effective August 2006, which expressly governs autopsy specimens, classifying them as medical waste and authorizing the coroner to dispose of them as such. However, the court noted that "[e]ven before R.C. 313.123 was enacted, a deceased's next of kin had no protected right in the autopsy specimens pursuant to Ohio statutes." *Albrecht*, 118 Ohio St. 3d at 355.

Referring to Ohio Revised Code § 313.131(B), which authorizes coroners to perform an autopsy when the coroner believes an autopsy is necessary, the court noted that "[a] coroner's forensic examination is a classic function of the police power of the state." The court then explained the balance that exists between the rights of a decedent's next of kin and the power of the state. Ohio Revised Code § 313.14 gives the next of kin the right to disposition of the body of the deceased person. "However, pursuant to R.C. 313.15, '[a]ll dead bodies in the custody of the coroner shall be held until

such time as the coroner, after consultation with [state officials], has decided that it is no longer necessary to hold such body to enable him to decide on a diagnosis giving reasonable and true cause of death, or to decide that such body is no longer necessary to assist any of such officials in his duties.'" In addition, the coroner has no obligation to obtain consent from the next of kin of a decedent to perform an autopsy, and the coroner's right to perform an autopsy is paramount to the ability of the decedent or next of kin to make a gift of a body part. *Albrecht*, 118 Ohio St. 3d at 356-57 (citing Ohio Rev. Code §§ 2108.52 and 313.13(A)). Guided by these statutes, the court determined that "while R.C. 313.14 gives next of kin a right to disposition of the body, that right does not arise until *after* the coroner has performed his duties and does not include forensic specimens that were retained by a coroner for forensic examination and testing." *Id.* at 357.

Following its examination of the Ohio statutes, the court went on to note that while it had not previously addressed the issue, several lower Ohio courts, in cases decided prior to *Brotherton*, held that "[a] dead body is not property." *Id.* (citing *Hadsell v. Hadsell*, 7 Ohio C.C. 196, 1893 WL 942, at *3 (Allen Cir. Ct. 1893); *Hayhurst v. Hayhurst*, 4 Ohio Law Abs. 375, 1926 WL 2487 (Hamilton C.P. 1926)). The court then reached the following conclusion:

> [N]othing in the United States Constitution, the Ohio Constitution, Ohio statutes, or common law establish a protected right in autopsy specimens in Ohio. R.C. 313.14 simply clarifies whom the coroner should contact to make funeral arrangements. The interest that Ohio statutes at issue here give the next of kin in an

> autopsied decedent's body is to inter or cremate the body after the autopsy has been performed. Our decision today addresses only autopsy specimens and not body parts or fluids that the coroner or the examining individual does not consider necessary to be examined, tested, or retained in the autopsy.

Id. at 358. The case is once again before this Court for resolution. Defendants argue that the Supreme Court of Ohio's answer to the certified question defeats Plaintiffs' federal claims as a matter of law.

II. LEGAL STANDARD

"For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007) (quoting *S. Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir.1973)). "A Rule 12(c) motion 'is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law.'" *Id.* (quoting *Paskvan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991)).

III. ANALYSIS

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983 alleging that Defendants had violated their constitutional rights as established by the Sixth Circuit in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), in which, according to Plaintiffs, the court

"held that family members do have a property interest in the body of their dead loved one which is protected by the Constitution and is enforceable pursuant to 28 U.S.C. Section 1983." (Doc. 1 ¶ 45.)

Brotherton concerned a coroner's removal of a deceased man's corneas for use as anatomical gifts without the widow's or her children's consent. The case involved Ohio's Anatomical Gift Act, specifically, Revised Code § 2108.60(B), which permits a coroner to remove the corneas of autopsy subjects without obtaining the consent of a family member, provided that the coroner has no knowledge of an objection by the decedent or the next of kin. The widow had voiced objection at the hospital when asked if she wanted to donate her husband's corneas. However, the hospital did not communicate the wishes of the widow to the coroner, and the coroner's office did not inquire as to whether there was any objection. *Brotherton*, 923 F.2d at 478.

To the contrary, this case involves the coroner's retention and disposal of an autopsy specimen. Plaintiffs do not dispute that the coroner appropriately performed the autopsy, and they do not allege that the coroner mishandled or in any way abused the body. Thus, this case is factually distinct from *Brotherton* and does not implicate the statute on which the *Brotherton* court relied to reach its holding that the "aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment." *Id.* at 482. The Sixth Circuit also recognized that *Brotherton* is

distinguishable from the instant case. *In re Albrecht*, No. 07-3419, slip op. at 3 (6th Cir. May 2, 2007).

Because resolution of Plaintiffs' claim depends on what Ohio law provides with respect to a next of kin's rights in autopsy specimens, and there was no binding law on point, this Court certified the question of state law to Ohio's high court. That court answered the question in the negative. "Principles of comity require federal courts to defer to a state's judgment on issues of state law." *Israfil v. Russell*, 276 F.3d 768, 771 (6th Cir. 2001). Because Ohio law does not give the next of kin of a decedent upon whom an autopsy has been performed a protected right in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing, Plaintiffs' action brought pursuant to 42 U.S.C. § 1983 fails as a matter of law.

Plaintiffs seek to avoid this result by arguing that the Supreme Court of Ohio's holding does not apply to this case because the decision in *Albrecht* cannot "overrule" the Sixth Circuit's decision in *Brotherton*. According to Plaintiffs, *Brotherton* "held that the next-of-kin did have a protected interest under state law to the post-autopsy disposition of body parts of their loved ones." (Doc. 100 at 4 (citing *Brotherton*, 923 F.2d at 481-82). They assert that this holding was the law of the circuit at the time their son's autopsy was performed, and that any decision by the Supreme Court of Ohio cannot work retroactively to take away the rights that *Brotherton* established.

Contrary to Plaintiff's assertion, *Brotherton* did *not* hold that next of kin have a protected interest under state law to the post-autopsy disposition of body parts.

Brotherton held, on distinguishable facts, that "the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body, including his corneas." 923 F.2d at 482. The question of whether Ohio law gives next of kin a right in a decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic testing had not been considered by the Sixth Circuit or by any Ohio state court prior to the *Albrecht* decision.[1] *Brotherton* did not establish any rights for next of kin with respect to body parts that have been removed and retained by the coroner for forensic examination and testing and thus did not establish the law applicable to the circumstances

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[1] The United States District Court for the Southern District of Ohio did consider this issue in *Hainey v. Parrott*, No. 1:02-CV-733, 2005 WL 2397704 (S.D. Ohio Sept. 28, 2005). The court acknowledged that the "potentially dispositive threshold issue [was] whether Plaintiffs [had] any constitutionally cognizable interest in the remains of their decedents." *Id.* at *3.

The *Hainey* court found that *Brotherton* was the primary case on point and examined "whether *Brotherton* [was] distinguishable from the facts of this case in any meaningful way." *Id.* at *5. The court noted that the coroner's decision to retain the decedent's brain was forensically or scientifically necessary, whereas the coroner's harvesting of Brotherton's corneas "amounted to state-sanctioned grave robbing." *Id.* Nonetheless, the *Hainey* court concluded that "these differences in facts likely do not take this case outside the broad holding in *Brotherton* that there is a substantial and protectable constitutional interest in the dead body of a relative or loved one." *Id.*

When presented with the identical question, this Court suspected that the fact differences likely *would* take the case outside the broad holding in *Brotherton*. Thus, the Court certified the question to the Supreme Court of Ohio for a determination of what Ohio law provided.

presented in this case. Further, *Albrecht* did not contradict *Brotherton* or create new law. Rather, the Supreme Court of Ohio illuminated the fact that both before and after *Brotherton*, Ohio law did not grant the entitlement that Plaintiffs claim. Thus, the Court need not undertake an analysis of whether the decision from the Ohio court is entitled to retroactive effect.

Finally, Defendants ask this Court to refuse to exercise its supplemental jurisdiction over the residual state law claims. Under 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." "Generally, 'if the federal claims are dismissed before trial, ... the state claims should be dismissed as well.'" *Taylor v. First of America Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)). In this case, neither judicial economy nor fairness weigh in favor of this Court retaining jurisdiction over Plaintiffs' remaining state law tort claims.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motions for Judgment on the Pleadings (docs. 93 and 95) are **GRANTED**. The Supreme Court of Ohio decided in *Albrecht v. Treon* that next of kin did not have any constitutionally cognizable interest in the autopsy specimens of the decedent that were removed and retained by the coroner for forensic examination and testing. Defendants therefore are entitled to judgment on Plaintiffs' federal law claims. The Court declines to exercise supplemental jurisdiction over Plaintiffs'

remaining state law claims. Oral argument is not essential to the resolution of these issues, and Plaintiffs' Request for Oral Argument (doc. 107) is **DENIED**.

IT IS SO ORDERED.

s/Susan J. Dlott
Chief Judge Susan J. Dlott
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 1:06cv274

[Filed May 15, 2009]

Mark Albrecht, et al.,	)
	)
Plaintiff(s)	)
	)
vs.	)
	)
Brian Treon, et al.,	)
	)
Defendant(s)	)
	)

Chief Judge Susan J. Dlott

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

. . . Defendants' motions for judgment on the pleadings (docs. 93 and 95) are GRANTED. The Court declines to

exercise supplemental jurisdiction over Plaintiff's remaining state law claims. Oral argument is not essential to the resolution of these issues, and Plaintiff's request for oral argument (doc. 107) is DENIED.

5/15/09

JAMES BONINI, CLERK

S/William Miller
Deputy Clerk

Pursuant to S. D. Ohio Civ. R. 79.2(a) and (b), all models, diagrams, depositions, photographs, x-rays and other exhibits and materials filed or offered in evidence shall be withdrawn by counsel without further Order within six (6) months after final termination of the action. All materials not withdrawn shall be disposed of by the Clerk as waste.

APPENDIX D

THE SUPREME COURT OF OHIO

Case No. 2007-0507

[Filed June 5, 2008]

Mark Albrecht et al.	)
	)
v.	)
	)
Brian Treon, M.D., et al.	)
	)

ENTRY

This cause came before the Court on the certification of a state law question from the United States District Court for the Southern District of Ohio, Western Division. Upon review of the preliminary memoranda, the Court determined that it would answer the certified question.

The certified question is answered in the negative. The next of kin of a decedent, upon whom an autopsy has been performed, do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

[Cite as *Albrecht v. Treon*, 118 Ohio St.3d 348, 2008-Ohio-2617.]

THE SUPREME COURT OF OHIO

Case No. 2007-0507

[Filed June 5, 2008]

Mark Albrecht et al.	)
	)
v.	)
	)
Brian Treon, M.D., et al.	)
	)

OPINION

The next of kin of a decedent upon whom an autopsy has been performed do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing.

(No. 2007-0507 — Submitted January 23, 2008 — Decided June 5, 2008.)

ON ORDER from the United States District Court for the Southern District of Ohio, Western Division, Certifying State Law Question, NO. 1:06cv274.

SYLLABUS OF THE COURT

The next of kin of a decedent upon whom an autopsy has been performed do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing.

LUNDBERG STRATTON, J.

I. Introduction

Background

{¶ 1} This case involves the balancing of delicate issues involving a family's right to properly bury their deceased loved one in a condition that is as complete as possible against the state's right to conduct an autopsy where appropriate in a thorough and timely manner. Today we must determine whether the next of kin of a decedent upon whom an autopsy has been performed have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing.

{¶ 2} The respondents, Mark and Diane Albrecht, argue that the coroner should be required to give notice to the deceased's next of kin[1] of the coroner's intent to retain certain forensic specimens for several

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[1] We use "next of kin" to mean any one or more persons entitled to claim a decedent's body from the coroner's office.

weeks to complete the autopsy, and allow the next of kin to decide whether they want to receive the specimens when the coroner is through with them. This case could have implications far beyond simply the parties involved, as is evidenced by the number of amicus briefs that have been filed, including briefs by the National Association of Medical Examiners, the County Commissioners' Association of Ohio, the Buckeye State Sheriffs' Association, the Ohio Association of Chiefs of Police, the Ohio Prosecuting Attorneys Association, the Ohio Society of Pathologists, the Ohio State Coroners Association, the Ohio State Medical Association, the Ohio Attorney General's Office, 65 counties that are affected by this ruling, and two funeral homes. In oral argument it was argued that our answer may also affect other aspects of the medical profession, such as when surgeons remove organs and body tissue during surgery. However, many of the arguments raised by the parties and amici relate to public-policy issues, not legal issues.

{¶ 3} Coroners have conducted autopsies in Ohio for several decades. Autopsies serve an important public function relating to health, science, and criminal investigation. However, we must take the law of Ohio as we find it and leave the crafting of new solutions to the General Assembly. Courts are not the proper forum for regulating the practices, standards, customs, policies, and procedures of autopsies in Ohio, as long as they pass constitutional muster. Therefore, we must look to the law to determine whether the next of kin have a protected right in the autopsy specimens of their deceased after an autopsy is complete.

Facts

{¶ 4} Respondents initiated the underlying lawsuit against the coroner of Clermont County, Ohio, Dr. Brian Treon, the Board of County Commissioners, and the commissioners individually. After the death of the Albrechts' son, Christopher Albrecht, in accordance with proper forensic practice and statutory obligations, the Hamilton County Coroner retained their son's brain for further examination to determine the cause of death. Upon review of the autopsy report, the Albrechts discovered that their son's brain had been retained by the coroner's office when it released the body to them and had been disposed of after completion of the autopsy, thereby prompting them to file the underlying cause of action for damages.

{¶ 5} The underlying case was filed in the United States District Court for the Southern District of Ohio and is now a putative class-action suit against all county coroners and/or medical examiners in the state of Ohio who, prior to a recent change in the law, had removed, retained, and disposed of body parts without prior notice to next of kin, and the county commissioners of those counties. Eighty-seven counties (all Ohio counties except Hamilton, which has already settled a similar suit) are implicated in the suit.

{¶ 6} On March 16, 2007, Judge Susan J. Dlott of the United States District Court for the Southern District of Ohio, Western Division, certified a question of state law for review to this court pursuant to S.Ct.Prac.R. XVIII. On June 11, 2007, this court agreed to answer the following question: "Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a protected right under Ohio law

in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing."

{¶ 7} Respondents do not assert that they did not receive the body of their son for burial, nor do they contend that petitioners mishandled or in any way abused the body. They allege, instead, that once the autopsy was completed, they should have been given the opportunity to retrieve the brain for burial. Respondents argue that petitioners' failure to give them that opportunity violated their due-process rights.

{¶ 8} For the following reasons, we answer the certified question in the negative and hold that the next of kin of a decedent upon whom an autopsy has been performed do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing.

II. Autopsy Process and Protocol

{¶ 9} An autopsy includes, by definition, the removal and sometimes the retention of specimens from the human body:

{¶ 10} "'[A]utopsy' means the external and internal examination of the body of a deceased person, including, but not limited to, gross visual inspection and *dissection of the body and its internal organs*, photographic or narrative documentation of findings, microscopic, radiological, toxicological, chemical, or other laboratory analyses performed in the discretion of the examining individual upon tissues, organs,

blood, other bodily fluids, gases, or any other specimens and the *retention for diagnostic and documentary purposes of tissues, organs, blood, other bodily fluids, gases, or any other specimens* as the examining individual considers necessary to establish and defend against challenges to the cause and manner of death of the deceased person." (Emphasis added.) R.C. 313.123(A)(1).

{¶ 11} The brain is a common site of diseases that are responsible for death. Sheaff, Michael T. & Hopster, Deborah J., Post Mortem Technique Handbook (2d Ed.2005) 282. Also, injuries to and abnormalities of the brain, such as subdural hematoma (often caused by the head's hitting a hard surface), inflammation of the brain, stroke, and tumors, may not be obvious without dissecting the brain. Wagner, Scott A., The Color Atlas of the Autopsy (2004) 203. Therefore, all autopsies performed under a coroner's jurisdiction require the examination of the brain. Id.

{¶ 12} During an autopsy, after the brain is removed from the skull, the medical professional uses his or her discretion in determining whether to dissect the brain in its fresh state (without soaking it in any solution to promote hardening) or in a fixed state (after it has soaked in a hardening solution). Post Mortem Technique Handbook 285.

{¶ 13} Fixation of a brain is accomplished by suspending the brain upside down in a large container of ten percent formol saline (formalin) for at least four to six weeks. Post Mortem Technique Handbook 285. Although the dissections of fixed and fresh brains are identical, fixation of the brain prior to dissection

provides for a superior neuropathological examination. Id. Moreover, in cases in which there have been contusions or other injuries to the head (such as falling on a hard surface), inflammation (meningitis), fractures, or stroke, in cases in which there is reason to believe there are unexpected tumors or old injuries, or in cases involving sudden unexpected deaths of children, fixation of the brain prior to dissection provides a far better neuropathological examination. Id.; The Color Atlas of the Autopsy 2, 203. Thus, due to the length of time required for proper fixation of the brain, the coroner often returns the body without the brain and later destroys the brain after the examination is completed.

III. Analysis

{¶ 14} Respondents argue that they were denied due process of law when the coroner destroyed their deceased son's brain after autopsy without giving them the opportunity to retrieve the brain for burial. For respondents to be successful, they must show that state law in effect at the time of the incident gave them a property interest in their deceased son's body parts. *Board of Regents of State Colleges v. Roth* (1972), 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548. See also *State ex rel. Horvath v. State Teachers Retirement Bd.* (1998), 83 Ohio St.3d 67, 73, 697 N.E.2d 644. Therefore, we must determine whether the next of kin of a decedent have a protected right in autopsy specimens under Ohio law.

Brotherton and Its Progeny

{¶ 15} In a related mandamus action before the Sixth Circuit Court of Appeals, the court noted that

respondents argued that the court had already decided the question in *Brotherton v. Cleveland* (C.A.6, 1991), 923 F.2d 477. In *Brotherton*, a widow brought a civil-rights action regarding a coroner's alleged violation of her equal-protection and due-process rights in permitting removal of her deceased husband's corneas for use as anatomical gifts without the widow's or her children's consent. That case involved R.C. Chapter 2108, Ohio's Anatomical Gift Act, and specifically R.C. 2108.60(B), which permits a coroner to remove the corneas of autopsy subjects without obtaining the consent of a family member, provided that the coroner has no knowledge of an objection by the decedent or the next of kin. The widow had voiced objection at the hospital when asked if she wanted to donate her husband's corneas. However, because her husband's death was considered a possible suicide, his body was taken to the coroner's office for an autopsy. The hospital did not communicate the wishes of the widow to the coroner, and the coroner's office did not inquire as to whether there was any objection. *Brotherton*, 923 F.2d at 478.

{¶ 16} The *Brotherton* court concluded that a majority of the courts that had been confronted with the issue whether a person can have a property interest in a dead body had found that a property right of some kind did exist and that some of those courts referred to the right as a "quasi-property right." Id. at 480. However, the court noted that two Ohio appellate courts had not characterized the right as a property right. Id. One court refused to characterize it that way. The court cited *Carney v. Knollwood Cemetery Assn.* (1986), 33 Ohio App.3d 31, 35-37, 514 N.E.2d 430, and *Everman v. Davis* (1989), 54 Ohio App.3d 119, 561 N.E.2d 547.

{¶ 17} The *Brotherton* court, in examining R.C. 2108.02(B), which governs who may make anatomical gifts of a decedent's body parts, concluded that "[a]lthough extremely regulated, in sum, these rights [possessory right and the right to have the body remain undisturbed] form a substantial interest in the dead body, regardless of Ohio's classification of that interest." *Brotherton*, 923 F.2d at 482. Thus, the court held that the "aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment." Id.

{¶ 18} The dissent in *Brotherton* charged that the majority was "wrong in its holding that the procedural requisites for dealing with non-property can rise to become property and be protected by the fourteenth amendment. Nor can the grant of procedures to enhance the health and well-being of others in society and the imposition of duties on persons (coroners or hospitals) grant property rights protected by the fourteenth amendment in favor of the decedent's relatives." Id., 923 F.2d at 484.

{¶ 19} *Brotherton*, however, involved R.C. Chapter 2108, the Anatomical Gift Act, as it related to removal of corneas from autopsy subjects for use by eye banks. Thus, *Brotherton*'s specific holding regarding removal of corneas for purposes unrelated to the autopsy is not relevant in this case. The two cases relied upon in *Brotherton*, *Carney* and *Everman*, also are not relevant to our inquiry today.

{¶ 20} *Carney* involved a claim for the mishandling of a dead body, which clearly distinguishes it from the

case at bar. The Eighth District Court of Appeals rejected the theory that a surviving custodian has quasi-property rights in the body of the deceased and noted a trend away from this "quasi-property fiction." *Carney*, 33 Ohio App.3d at 35-36, 514 N.E.2d 430.

{¶ 21} In *Everman*, the spouse of a motorist killed in an automobile accident brought an action against the county coroner and others, alleging emotional distress resulting from the coroner's decision to perform an allegedly unnecessary autopsy. *Everman*, 54 Ohio App.3d at 120, 561 N.E.2d 547. The Second District rejected the theory that a husband's right to possession of his deceased wife's body for purposes of preparation, mourning, and burial is protected by the Fourth Amendment to the United States Constitution, which provides that persons, houses, and effects are protected against unreasonable search and seizure. Id. at 122. The court concluded that nothing in the language of the Fourth Amendment suggests that the body of the former person is part of the "effects" of anyone else. Id.

{¶ 22} The case at bar does not involve the Anatomical Gift Act (as *Brotherton* did), the denial of a right to bury a decedent (as *Everman* did), or the unauthorized disturbance of a body (as *Carney* did).

{¶ 23} The Sixth Circuit's decision in *Montgomery v. Clinton Cty.* (C.A.6, 1991), 940 F.2d 661 (Table), however, involved an autopsy to which the decedent's next of kin objected. In *Montgomery*, the plaintiffs filed suit against a coroner who had performed an autopsy on their deceased son without their consent, but within the scope of his statutory duties. In denying the plaintiffs' due-process claim, the Sixth Circuit held:

"There is no merit in the procedural due process claim founded on the state statutory requirement that the medical examiner make a diligent effort to notify the next of kin as to the decision to perform an autopsy. Whatever the nature of the right created by the statute there is an insufficient liberty or property interest under this statute to create a valid procedural due process claim. Although the notice requirement in the state statute does not appear to be discretionary, it does not purport to establish a right to control the dead body. We would distinguish this case from *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir.1991). In *Brotherton*, the plaintiff had an 'aggregate of rights granted by the state of Ohio' to control disposition of the body, including the corneas, and thus had a right to refuse removal of corneas for purposes of a cornea transplant. *Id.* at 482." *Montgomery* at *2. Although it involved Michigan law, the Sixth Circuit found that the Michigan statute did not create a sufficient interest to support a due-process claim for the coroner's failure to give notice before the autopsy.

{¶ 24} In 2005, in *Hainey v. Parrott* (Sept. 28, 2005), S.D.Ohio No. 1:02-CV-733, 2005 WL 2397704, the United States District Court for the Southern District of Ohio examined a case with facts similar to those in the case at bar. In *Hainey*, the named plaintiffs and the class members they represented each had a family member who had died under circumstances in which the Hamilton County coroner decided pursuant to his statutory grant of authority and discretion that an autopsy was necessary to determine the cause of death and that the brain would need to be examined after being fixed, a process that, as previously mentioned, takes several weeks. The coroner's office did not notify the plaintiffs, either prior

to or at the time of the release of the bodies, that it would be retaining the brains of the decedents for further forensic examination. Nor did the coroner's office notify the plaintiffs when examination of their decedent's brain was complete so that they could, if they chose, recover the remains to be interred with the other remains of the decedent or for other disposition. Id. at *1.

{¶ 25} The plaintiffs argued that the coroner should have advised them that it was necessary to retain the brains of their decedents for purposes of performing the autopsy and that upon completion of the autopsy, the coroner should have notified them so that they could have retrieved the remains and interred them. The plaintiffs also argued that if they had been given prior notice, they could have decided to delay the recovery of their decedents' remains until the autopsy was finished, so that the remains could be restored as completely as possible before interment. Plaintiffs claimed that the coroner's policy of not giving them any notice regarding the retention and disposal of their decedents' brains deprived them of their property interest in their decedents' remains without due process of law. Id. at *4.

{¶ 26} The district court concluded that the plaintiffs had a "cognizable constitutional property interest in their decedent's body parts which the coroner's office violated when it disposed of their decedents' brains without prior notice." Id. at *6. The court concluded that "[a]lthough it is a given that of necessity tissue and fluids will be destroyed [as] a result of performing the autopsy, the right to take possession of what remains of the deceased's body following the completion of the autopsy in no way

conflicts with the coroner's admittedly superior prior interest to take custody of the body and complete what procedures are necessary to determine the cause of death." Id. The court further noted that in practical terms, this may mean that when an examination of the brain is required to determine the cause of death, the coroner will simply exercise his statutory authority under R.C. 313.15 to retain the entire body for the several weeks it takes to complete fixation and analysis of the brain. "Whether this [is] a desirable outcome of this litigation is a different question, but in light of state law, such a decision or policy seemingly would not be an infringement on any property interests of the next-of-kin." Id.

{¶ 27} *Brotherton*, 923 F.2d 477, upon which the district court in *Hainey* relied, involved the coroner's retaining corneas to give to a third party, a practice prohibited by state statute when the coroner is aware that an objection has been made by the decedent prior to death or by the decedent's next of kin. The *Hainey* court expanded the holding of *Brotherton* to apply to situations in which the coroner removed and retained organs for additional forensic examination and testing, a procedure that the coroner is clearly authorized by statute to do. *Hainey's* expansion of *Brotherton* is unsupported by Ohio law.

{¶ 28} "Principles of comity require federal courts to defer to a state's judgment on issues of state law * * *." *Israfil v. Russell* (C.A.6, 2001), 276 F.3d 768, 771. Moreover, the Sixth Circuit noted in its related mandamus action that the respondents were invoking a holding (*Brotherton)* in a decision issued in another case on a distinguishable set of facts. Further, the court noted that since *Brotherton* was decided, changes

in Ohio law suggest that another reading may be possible. After *Hainey* was decided, and after the acts giving rise to the underlying action in this case, the General Assembly enacted R.C. 313.123, effective August 2006, which now expressly governs retained autopsy specimens, classifying them as medical waste and authorizing the coroner to dispose of them as such.

Ohio Statutes at the Time Pertinent to This Case

{¶ 29} Even before R.C. 313.123 was enacted, a deceased's next of kin had no protected right in autopsy specimens pursuant to Ohio statutes. The Ohio Revised Code authorizes coroners to perform an autopsy when the coroner believes an autopsy is necessary. R.C. 313.131(B). A coroner's forensic examination is a classic function of the police power of the state. Many times, autopsy specimens and the results of the forensic examination are essential evidence in the prosecution of a crime. Sometimes, autopsy specimens must be preserved for long periods of time.

{¶ 30} "When any person dies as a result of criminal or other violent means, by casualty, by suicide, or in any suspicious or unusual manner, when any person, including a child under two years of age, dies suddenly when in apparent good health, or when any mentally retarded person or developmentally disabled person dies regardless of the circumstances," the coroner must be immediately notified by the attending physician or law enforcement agency that obtains knowledge thereof. R.C. 313.12.

{¶ 31} Pursuant to R.C. 313.121, if a child under two years of age dies suddenly when in apparent good

health, the death must be reported immediately to the coroner, and, with certain exceptions, the coroner or deputy coroner must perform an autopsy on the child. In accordance with R.C. 313.121 and 313.131, the coroner may decide not to perform an autopsy on the child if the coroner has reason to believe it would be against the religious beliefs of the child's parents. However, the coroner is authorized under both sections to perform the autopsy in spite of those religious beliefs when the coroner concludes that the autopsy is a compelling public necessity. R.C. 313.131. Further, the Ohio Administrative Code mandates that coroners retain the brain and other specimens resulting from the autopsy of a child under two for a period of at least six months when warranted by the circumstances. Ohio Adm.Code 3701-5-14(B)(6).

{¶ 32} "The coroner shall notify any known relatives of a deceased person who meets death in the manner described by section 313.12 of the Revised Code by letter or otherwise. The next of kin, other relatives, or friends of the deceased person, in the order named, shall have prior right as to disposition of the body of such deceased person." R.C. 313.14. However, pursuant to R.C. 313.15, "[a]ll dead bodies in the custody of the corner shall be held until such time as the coroner, after consultation with the prosecuting attorney, or with the police department * * * or with the sheriff, has decided that it is no longer necessary to hold such body to enable him to decide on a diagnosis giving a reasonable and true cause of death, or to decide that such body is no longer necessary to assist any of such officials in his duties."

{¶ 33} In 2006, the Ohio General Assembly enacted R.C. 313.123, which defines the term "autopsy" for

purposes of R.C. Chapter 313 and provides that "[e]xcept as otherwise provided in division (B)(2) of this section, retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy *are medical waste* and shall be disposed of in accordance with applicable federal and state laws, including any protocol rules adopted under section 313.122 of the Revised Code." R.C. 313.123(B)(1). (Emphasis added.) The respondents' claims in this case arose before this statute's enactment.

{¶ 34} Moreover, R.C. 313.123 notes that if an autopsy is performed on a deceased person and the coroner has reason to believe that the autopsy is contrary to the deceased's religious beliefs, the coroner shall not remove any specimens, including, but not limited to, tissues, organs, blood, or other bodily fluids, from the body of the deceased person unless it is a compelling public necessity. And with the exception of a DNA specimen, which may be retained, "the coroner shall return the specimens, as soon as is practicable, to the person who has the right to the disposition of the body." R.C. 313.123(B)(2) and (B)(3).

{¶ 35} When the coroner is informed that an autopsy is "contrary to the deceased person's religious beliefs," the coroner is to delay the autopsy for 48 hours to give the objecting person time to file suit to enjoin the autopsy. R.C. But this rule does not apply to cases involving aggravated murder, suspected aggravated murder, murder, suspected murder, manslaughter offenses, or suspected manslaughter offenses. R.C. 313.131(F)(1). Also, the coroner has no obligation to obtain consent from the next of kin of a decedent to perform an autopsy. R.C. 2108.52. Further, the coroner's right to perform an autopsy is paramount

to the ability of the decedent or next of kin to make a gift of a body part. R.C. 313.13(A).

{¶ 36} Thus, while R.C. 313.14 gives next of kin a right to disposition of the body, that right does not arise until *after* the coroner has performed his duties and does not include forensic specimens that were retained by a coroner for forensic examination and testing.

Other Ohio Cases

{¶ 37} Although this court has not previously addressed this issue, several lower Ohio courts, in cases decided prior to *Brotherton*, held that a dead body is not property. In *Hadsell v. Hadsell* (Allen Cir.Ct. 1893), 7 Ohio C.C. 196, 1893 WL 942, *3, the court held that "[a] dead body is not property." Similarly, in *Hayhurst v. Hayhurst* (Mar.1926), Hamilton C.P. No. 199594, 4 Ohio Law Abs. 375, 1926 WL 2487, the Hamilton County Common Pleas Court held that "[t]here can be no property in a dead body and therefore a man cannot by will, dispose of same, and it does not become part of his estate." And as previously mentioned, in *Carney* and *Everman*, two Ohio courts more recently rejected the theory that a surviving custodian has quasi-property rights in the body of the deceased.

Other Jurisdictions

{¶ 38} In *Fuller v. Marx* (C.A.8, 1984), 724 F.2d 717 (applying Arkansas state law), the widow of a decedent sued the coroner, alleging that the decedent's organs had been disposed of, which she alleged was a violation of her constitutional rights. The Eighth Circuit

recognized that under Arkansas law, the next of kin does have a quasi-property right in the dead body. Id., 724 F.2d at 719. However, the court noted that it knew of no Arkansas cases extending this quasi-property right to all of the body's organs. Id. The court rejected the widow's claim, holding that the failure of the coroner to return the decedent's organs after the autopsy did not violate the widow's rights. Id.

{¶ 39} In *Culpepper v. Pearl Street Bldg., Inc.* (Colo.1994), 877 P.2d 877, parents brought an action against those involved in mistakenly cremating their son's body. The Supreme Court of Colorado held that there was no property right in a dead body that would support a claim for conversion. Id., 877 P.2d at 882.

{¶ 40} Finally, in *Shults v. United States* (D.Kan.1998), 995 F.Supp. 1270 (applying Mississippi law), the parents of a decedent upon whom an autopsy had been performed filed suit claiming, among other things, a property interest in the body's organs (including the brain and heart) that had been removed during the autopsy (and later incinerated) and not included with the body for burial. The district court held that no property right exists in a dead body that would support an action for conversion. Id. at 1275-1276. The court concluded that the only right in remains recognized by Mississippi law is the family right to possess the body for burial and that that right does not create a property right in the organs removed for examination. Id., 995 F.Supp. at 1275.

IV. Conclusion

{¶ 41} We are mindful of the right of a decedent's next of kin to attend to the proper preparation and

burial or cremation of the body. But nothing in the United States Constitution, the Ohio Constitution, Ohio statutes, or common law establish a protected right in autopsy specimens in Ohio. R.C. 313.14 simply clarifies whom the coroner should contact to make funeral arrangements. The interest that Ohio statutes at issue here give next of kin in an autopsied decedent's body is to inter or cremate the body after the autopsy has been performed. Our decision today addresses only autopsy specimens, and not body parts or fluids that the coroner or the examining individual does not consider necessary to be examined, tested, or retained in the autopsy.

{¶ 42} If the General Assembly believes that next of kin should have a right to autopsy specimens when the coroner's office is through with them, it should provide that right by statute. The issues of whether notice is required, what notice is required, and whether and under what circumstances tissue and organs can be removed and retained during the course of an autopsy are issues for the legislature, not the courts.

{¶ 43} Accordingly, we answer the certified question in the negative, holding that the next of kin of a decedent upon whom an autopsy has been performed do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the corner for forensic examination and testing.

So answered.

O'CONNOR, O'DONNELL, LANZINGER, and CUPP, JJ., concur.
MOYER, C.J., concurs in answer only.
PFEIFER, J., dissents.

PFEIFER, J., dissenting.

{¶ 44} The only question we face today is whether Ohioans, upon the death of a family member, have a protected right in the decedent's body parts that were removed and retained by a coroner for forensic examination and testing. I dissent because I believe that prior to the enactment of R.C. 313.123, which purports to give the coroner the right to dispose of such body parts, Ohio law gave next of kin a protected right in a deceased family member's body. That right came from Ohio statutes and common law.

This Court's Limited Role

{¶ 45} Our role in this case is only to make a threshold determination as to whether a protected right exists in Ohio. And if we decided that such a right did exist, the federal court would have determined whether the right rose to a level requiring constitutional protection. "Although the existence of an interest may be a matter of state law, whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the due process clause is determined by federal law. *Memphis Light [Gas & Water Div. v. Craft,* 436 U.S. 1, 9, 98 S.Ct. 1554, 56 L.Ed.2d 30]. This determination does not rest on the label attached to a right granted by the state but rather on the substance of that right." *Brotherton v. Cleveland* (C.A.6, 1991), 923 F.2d 477, 481-482.

{¶ 46} As the majority opinion states, the status of the law at the time of the alleged wrong provides the relevant context in this case; the plaintiffs-respondents "must show that state law in effect at the time of the incident gave them a property interest in their deceased son's body parts." Majority opinion at ¶ 14. The United States Supreme Court in *Bd. of Regents of State Colleges v. Roth* (1972), 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548, held that "[p]roperty interests * * * are not created by the Constitution. Rather they are created and their dimensions are defined by *existing rules or understandings* that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (Emphasis added.) Thus, since R.C. 313.123 was not enacted until after the events in this case arose, it is not pertinent to this case.

{¶ 47} Our role, then, is to determine whether Ohio law prior to the enactment of R.C. 313.123 provided a right to a decedent's next of kin in the deceased's remains. In *Whaley v. Tuscola Cty.* (C.A.6, 1995), 58 F.3d 1111, 1115, the Sixth Circuit Court of Appeals summarized the sources of law that are the basis for Ohioans' rights in regard to the remains of a deceased family member:

{¶ 48} "When [Ohio case law] and the Ohio statute granting the next of kin the prior right to dispose of the body, and the Ohio Anatomical Act are taken together, it demonstrates that in Ohio there are existing 'rules and understandings' which grant the next of kin the right to dispose of the body by making a gift of it, to prevent others from damaging the body, and to possess the body for purposes of burial. Such

rights in an object are the heart and soul of the common law understanding of 'property.'"

Ohio Statutes

{¶ **49**} Foremost among the rules and understandings granting the next of kin control over a decedent's body is R.C. 313.14, which gives "[t]he next of kin * * * prior right as to disposition of the body of [the] deceased person." The majority cannot get around this statute, and thus tries to ignore it. The majority waits until well into its opinion, ¶ 32, to even mention R.C. 313.14, and even then merely quotes it without discussion. Some paragraphs later, it says in a conclusory fashion that the right granted in R.C. 313.14 "does not include forensic specimens that were retained by a coroner for forensic examination and testing." It does not deign to explain why not, because it cannot.

{¶ **50**} Pursuant to R.C. 313.14, it is the right of the next of kin of the deceased to dispose of the deceased's body. R.C. 313.14 does not list exceptions to that right. R.C. 313.14 does not define what constitutes the body, but R.C. 3705.01(C) states: " 'Dead body' means a human body or part of a human body from the condition of which it reasonably may be concluded that death recently occurred." Nothing in the Revised Code provides any reason to believe that body parts separated from the rest of the body during an autopsy do not continue to be part of the body.

{¶ **51**} R.C. 313.15 establishes that the coroner's right to control the decedent's body is jurisdictional and temporary. The coroner has a statutory duty to perform an autopsy in certain instances, not the right

to dispose of the body, and his right to control the body extends only as long as is necessary for the needs of law enforcement. R.C. 313.15 states:

{¶ 52} "All dead bodies in the custody of the coroner shall be held until such time as the coroner, after consultation with the prosecuting attorney * * * or with the sheriff, has decided that it is no longer necessary to hold such body to enable him to decide on a diagnosis giving a reasonable and true cause of death, or to decide that such body is no longer necessary to assist any of such officials in his duties."

{¶ 53} Pursuant to R.C. 313.15, the family's right to disposition of the body is limited only as to the time it may be exercised. By statute, the next of kin may have to wait some length of time, but the disposition of the body ultimately remains their right, and is exercised once the autopsy is complete. Implicit in the coroner's right to perform an autopsy is his right to do what is necessary to perform the autopsy. Therefore, the coroner cannot be held responsible for any bodily fluids or tissue samples lost in the autopsy process. But the right to the disposition of all of the remaining body parts after the autopsy belongs to the deceased's family.

{¶ 54} Further statutory support for the protected right of family members in the decedent's body is found in Ohio's Anatomical Gift Act, R.C. Chapter 2108. R.C. 2108.02(B) gives the next of kin the power to make an anatomical gift of any part of the body of the decedent, absent notice of the decedent's contrary indication. Further, a family member more closely related to the decedent has the right to prohibit any

anatomical gift from being made by a less closely related family member. The statute provides:

{¶ 55} "(B) Any of the following persons, in the order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may make an anatomical gift of all or any part of the body of a decedent for any purpose specified in section 2108.03 of the Revised Code:

{¶ 56} "(1) The spouse;

{¶ 57} "(2) An adult son or daughter;

{¶ 58} "(3) Either parent;

{¶ 59} "(4) An adult brother or sister;

{¶ 60} "(5) A grandparent;

{¶ 61} "(6) A guardian of the person of the decedent at the time of the decedent's death;

{¶ 62} "(7) Any other person authorized or under obligation to dispose of the body."

{¶ 63} Thus, again in R.C. 2108.02(B), the General Assembly sets forth the right of family members to the disposition of a decedent's body, giving family members the right to make anatomical gifts, and also the right to prevent an anatomical gift.

{¶ 64} All together, Ohio statutes grant next of kin important rights regarding the remains of a family member—the rights to possess, to control the disposition of, and to prevent the disposition of the remains.

State-Court Cases

{¶ 65} This is a case of first impression in this court, and the particulars of this matter are a first for all Ohio courts. However, a number of Ohio appellate decisions address in some manner the rights of next of kin to the remains of their deceased family members. Those cases establish that although a decedent's body is not chattel belonging to the next of kin, the next of kin may bring a cause of action in their own right if the remains of the deceased are not treated in an appropriate manner.

{¶ 66} In *Brownlee v. Pratt* (1946), 77 Ohio App. 533, 537-538, 33 O.O. 356, 68 N.E.2d 798, the court recognized Ohio's legal tradition supporting the proper repose of the dead.

{¶ 67} "The policy of the law to protect the dead and preserve the sanctity of the grave comes down to us from ancient times, having its more immediate origin in the ecclesiastical law. This salutary rule recognizes the tender sentiments uniformly found in the hearts of men, the natural desire that there be repose and reverence for the dead, and the sanctity of the sepulcher."

{¶ 68} The common law's attitude toward the proper treatment of the dead is not merely aspirational; instead, the law grants the next of kin a

remedy when a deceased's remains are mistreated. In *Brownlee*, the court found that the "plaintiff's right of burial of the dead was transgressed" when her stepmother placed the remains of her second husband in a burial vault containing the remains of the plaintiff's mother and father. Id. at 539, 33 O.O. 356, 68 N.E.2d 798.

{¶ **69**} Although the court in *Carney v. Knollwood Cemetery Assn.* (8th Dist.1986), 33 Ohio App.3d 31, 514 N.E.2d 430, rejected "the theory that a surviving custodian has quasi-property rights in the body of the deceased," id. at 37, it nonetheless recognized that the next of kin may properly bring an action for intentional infliction of emotional distress based upon the mistreatment of a deceased relative's remains. In *Carney*, a decedent's remains had been disinterred during the preparation for another burial and were then dumped on a refuse pile elsewhere in the cemetery. Id. at 31. The court quoted with approval the Wisconsin Supreme Court's discussion of familial rights regarding the treatment of a decedent's remains:

{¶ **70**} " 'The law is clear in this state that the family of the deceased has a legally recognized right to entomb the remains of the deceased family member in their integrity and without mutilation. Thus the next of kin have a claim against one who wrongfully mutilates or otherwise disturbs the corpse.' " *Carney*, 33 Ohio App.3d at 36, 514 N.E.2d 430, quoting *Scarpaci v. Milwaukee Cty.* (1980), 96 Wis.2d 663, 672, 292 N.W.2d 816.

{¶ **71**} In *Biro v. Hartman Funeral Home* (1995), 107 Ohio App.3d 508, 669 N.E.2d 65, the Eighth

District again recognized a cause of action in tort for the desecration of remains.

{¶ 72} In *Everman v. Davis* (1989), 54 Ohio App.3d 119, 561 N.E.2d 547, the spouse of a woman killed in a car accident brought an action against the county coroner, challenging the coroner's decision to perform an autopsy. The plaintiff alleged a violation of the Fourth Amendment right against unreasonable searches and seizures. Although the court found that the plaintiff had no cause of action against the coroner in that case, it made clear that a next of kin does have a possessory right in the remains of a loved one:

{¶ 73} "There is no issue in this case of the possessory right of a spouse or other appropriate member of the family to the body of the deceased person for the purpose of preparation, mourning and burial. This right is recognized by law and by the decisions. See R.C. 313.14. This is not to say that a corpse may not be temporarily held for investigation as to the true cause of death." *Everman,* 54 Ohio App.3d at 122, 561 N.E.2d 547.

{¶ 74} Unlike in *Everman*, there is no quarrel here with the coroner's right to perform an autopsy. The issue here is whether once the coroner has completed his duties, the next of kin can exercise their rights.

{¶ 75} The majority cites two ancient cases for the proposition that "a dead body is not property." Majority opinion at ¶ 37. That is not the point. The point is whether next of kin have a right to a proper disposition of the body, and the cases cited by the majority actually support that idea. Both cases support the idea that next of kin have the right to the

disposition of the body; in each case, the dispute is over *which* next of kin has that right.

{¶ 76} The majority first cites *Hadsell v. Hadsell* (Allen Cir.Ct.1893), 7 Ohio C.C. 196, 1893 WL 942, which involved a dispute between a stepmother and her deceased husband's children as to the proper spot for their father's burial. The *Hadsell* court wrote, "A dead body is not property. There are no next of kin to inherit it." Id. at *3. In so writing, the court rejected the idea that the right to disposition of the body is determined by the order of inheritance. But the court also noted that society recognizes that "when a person dies he is to be accorded decent burial." Id. The court found that the stepmother's wish to bury the deceased in a location where the plot could be cared for and a monument erected should win out. The court decided the case in favor of the party most likely to visit and take care of the grave:

{¶ 77} "In the case under consideration, if we are to conclude from what we have observed, it would not be Milo or James [the decedent's children] that would visit the grave of Almon E. Hadsell; no monument would they erect, no flowers would they strew upon the tomb. The monument to be erected is furnished by Mrs. Hadsell. The care to be bestowed upon the grave will be her care, and the flowers will be strewn by her hand." *Hadsell* at *3.

{¶ 78} The second case cited by the majority, *Hayhurst v. Hayhurst* (Mar.1926), Hamilton C.P. No. 199594, 4 Ohio Law Abs. 375, 1926 WL 2487, is a one-page common pleas court decision; it is another case involving a familial dispute regarding a place of burial. The *Hayhurst* court, too, found that "[t]here can

be no property in a dead body and therefore a man cannot by will, dispose of same, and it does not become part of his estate." The court was faced with competing family members' ideas on the decedent's burial, and found in making its decision that "[c]ases of this nature must be considered by a court of equity on their own merits having due regard to the wishes of the decedent and to the rights and feelings of those entitled to be heard by reason of relationship and association." Again in *Hayhurst*, the court recognized the rights of family members.

{¶ 79} Other older cases establish that the right of the next of kin to dispose of their family member's remains has been longstanding in Ohio. In 1886, this court acknowledged that "at common law there is a duty upon the husband to dispose of the body of his deceased wife by decent sepulture in a suitable place." *McClellan v. Filson* (1886), 44 Ohio St. 184, 187, 5 N.E. 861.

{¶ 80} In *Farley v. Carson* (Hamilton Cty.Dist.Ct. 1880), 8 Ohio Dec.Reprint 119, 1880 WL 6831, the court found that the right and duty of a wife to dispose of the body of her deceased husband by decent sepulture "must, of necessity, include the right to possession of the body in the fitness for burial in which death leaves it; and the organization of courts of justice would be defective if in a proper case redress by damages might not be afforded for wilful violation of such right." *Farley* at *2.

{¶ 81} The plaintiff widow alleged that her decedent husband's doctor had examined the decedent's body after death and had made an incision to examine an abscess on the deceased's liver. The

court found that the allegations, if proved, would state a cause of action. The court found that the plaintiff's petition "alleged wilful desecration and mutilation, which words were comprehensive enough to include that disturbance of the decent fitness of the body for burial, which would constitute the violation of a right. This was a right in plaintiff as a widow, and entitled her to an application of the rule, that wilful infringement by one person of a right existing in another, imports damage." Id.

{¶ 82} The court ruled in the doctor's favor on the facts, finding that the doctor's action "was not a mutilation of the body, or dismemberment or removal of any part or organ, and for all the purposes of fit and proper burial the body was left without disfigurement." *Farley*, 1880 WL 6831, at *3.

{¶ 83} All of the cited cases demonstrate that Ohio courts have long and consistently held that a deceased's family members have a right protected by law in the proper disposition of the deceased's body. It is a possessory right, and prevents others from damaging the body. There are no cases holding to the contrary.

Federal Cases

{¶ 84} Of course, the federal courts in the Sixth Circuit have already spoken on the issue we face today. In *Brotherton v. Cleveland* (C.A.6, 1991), 923 F.2d 477, the court held that under Ohio law the decedent's wife's interest in her husband's corneas rose to the level of a legitimate claim of entitlement protected by the Due Process Clause. In *Hainey v. Parrott* (Sept. 28, 2005), S.D.Ohio No. 1:02-CV-733,

2005 WL 2397704, a case virtually identical to the case we face today, the district court held that the plaintiffs had a "cognizable constitutional property interest in their decedent's body parts which the coroner's office violated when it disposed of their decedents' brains without prior notice." Hainey at *6.

Other Considerations

{¶ 85} In the end, this case is not about a random piece of human tissue. It is about the decedent's brain. A brain is not a fingernail. The brain was the source of the deceased's every thought, aspiration, dream, fear, laugh, memory, or emotion; it was the origin of every word spoken, every song sung, every joke told; everything a family member loved about the deceased could be traced back to it. If the next of kin have any right to the decedent's body, the right must include the brain.

Conclusion

{¶ 86} Whatever the label, Ohio statutes and common law establish that Ohio recognizes a next of kin's rights in the disposition of a deceased family member's remains. Those rights, at least prior to R.C. 313.123, extend to the whole of the body and all of its parts.

{¶ 87} How the coroner could have met his obligation to respect the rights of family members is not before this court. But the burden would not have been heavy. It would have required, as suggested by the court in *Hainey*, simply some kind of notice, with options as to the ultimate disposition of the remaining body parts, to the next of kin, or a retention of the

entire body until it could be returned to the family in its entirety.

{¶ 88} According to the majority, this case turns on the idea of property rights. But in truth, the point of the plaintiffs-respondents, and a point that has been recognized in Ohio law, is that a deceased's remains are not mere property. They are on a higher plane. The law does not require respect or reverence for property, but the law does require that in the treatment of the dead. It is a requirement of the living that we all will ultimately and assuredly also be the beneficiary of. It should not be disposed of for the sake of convenience.

Dworken & Bernstein Company, L.P.A., and Patrick J. Perotti; and John H. Metz, for respondents.

Donald W. White, Clermont County Prosecuting Attorney, and H. Elizabeth Mason, Assistant Prosecuting Attorney, for petitioners.

Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co., L.P.A., John R. Climaco, David M. Cuppage, Scott D. Simpkins, and Jennifer L. Gardner; and William D. Mason, Cuyahoga County Prosecuting Attorney, and David G. Lambert, Frederick W. Whatley, and Renee A. Bacchhus, Assistant Prosecuting Attorneys, for amici curiae Cuyahoga County Coroner and Cuyahoga County Board of Commissioners, in support of petitioners.

Patrick M. Fardal, for amicus curiae the National Association of Medical Examiners, in support of petitioners.

Isaac, Brant, Ledman & Teetor, L.L.P., Mark Landes, David G. Jennings, and Jennifer H. George, for amici curiae 65 Ohio counties, County Commissioners' Association of Ohio, Buckeye State Sheriffs' Association, Ohio Association of Chiefs of Police, Ohio Prosecuting Attorneys Association, and Ohio Society of Pathologists, in support of petitioners.

Benesch, Friedlander, Coplan & Aronoff, L.L.P., Mark D. Tucker, and C. David Paragas, for amici curiae Ohio State Coroners Association and Ohio State Medical Association, in support of petitioners.

Nancy Hardin Rogers, Attorney General, and William P. Marshall, Solicitor General, for amicus curiae state of Ohio, in support of petitioners.

Ron O'Brien, Franklin County Prosecuting Attorney, and Nick A. Soulas Jr., A. Paul Thies, and Patrick J. Piccininni, Assistant Prosecuting Attorneys, for amici curiae Franklin County Board of Commissioners and Franklin County Coroner, in support of petitioners.

Dworken & Bernstein Co., L.P.A., Patrick J. Perotti, and Nicole T. Fiorelli; and John H. Metz, for amicus curiae Monreal Funeral Home, in support of respondents.

Dworken & Bernstein Co., L.P.A., Patrick J. Perotti, and Nicole T. Fiorelli; and John H. Metz, for amici curiae the Catholic League and Brunner Funeral Homes, in support of respondents.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 1:06cv274
DISTRICT JUDGE SUSAN J. DLOTT

[Filed March 12, 2007]

MARK ALBRECHT, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
BRIAN TREON, M.D., et al.,	)
	)
Defendants	)
	)

ORDER GRANTING MOTIONS TO CERTIFY A QUESTION TO THE OHIO SUPREME COURT

This matter is before the Court on the Motion of the Cuyahoga County Coroner and the Board of Commissioners of Cuyahoga County (hereafter "Cuyahoga County") to Certify a Question of State Law to the Ohio Supreme Court (doc. 34) and the like motions of 86 other Ohio county coroners and

commissioners,[1] Plaintiffs' brief in opposition to these motions (doc. 61), and the coroners' and commissioners' reply memoranda.[2] For the following reasons, the Court grants, with modification, the motions to certify a question to the Ohio Supreme Court.

I. BACKGROUND

This lawsuit is a putative class action against all county coroners and/or medical examiners in the State of Ohio which have removed, retained, and disposed of body parts without prior notice to next of kin, and the County Commissions and Commissioners of those counties. (Doc. 2 at 1.) Eighty-seven counties (all Ohio counties except Hamilton) are implicated in the suit.

The fundamental question is whether the relatives of a decedent have a legally cognizable interest under Ohio law, protected by the Fourteenth Amendment, in being notified by the county coroner that the coroner has removed and retained body parts of the decedent for forensic examination while returning the rest of the body to the family. Plaintiffs Mark and Diane Albrecht brought this lawsuit against the coroner of Clermont County, Ohio, as well as the Board of County Commissioners, after discovering from their son's autopsy report that the coroner's office, or others on its behalf, had removed their son's brain for forensic examination and retained it after the autopsy. (Doc. 1

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[1] See docs. 38, 40, 41, 43, 45, 46, 49, and 53.

[2] See docs. 77, 78, 79, 82, 83, and 85.

¶¶ 37-38.) The coroner's office did not notify the Albrechts that their son's brain had been retained. (*Id.* at ¶ 39.) The Albrechts thus buried their son without his brain and without any notice from the coroner of that fact. (*Id.* at ¶ 40.) They allege they have suffered legal damages as a result. (*Id.* at ¶ 41.)

The Albrechts filed their lawsuit on the heels of a nearly identical lawsuit brought by family members of decedents against the Hamilton County coroner. In that case, *Hainey v. Parrott*, Chief District Judge Beckwith granted summary judgment to the plaintiffs after concluding that they had "a cognizable constitutional property interest in their decedent's body parts which the coroner violated when it disposed of their decedents' brains without prior notice." Order Granting Mot. Summ. J., No. 1:02cv733, 2005 WL 2397704 at *6 (S.D. Ohio Sept. 28, 2005). Defendants appealed the Order to the Sixth Circuit Court of Appeals but then settled the lawsuit. As a result, the Sixth Circuit has not had an opportunity to affirm or overturn Judge Beckwith's Order.

The county coroners and commissioners in this lawsuit generally assert that Judge Beckwith "improperly expanded" Sixth Circuit precedent and "misinterpreted" Ohio law when she concluded that next of kin have a property interest in a decedent's organs. They ask this Court to depart from the course set out in *Hainey* and instead certify to the Supreme Court of Ohio the following question:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a property right under Ohio law in the decedent's tissues, organs, blood or other body parts that

have been removed and retained by the coroner for forensic examination and testing.

(Doc 34 at 1.)

II. ANALYSIS

A. Standard for Certifying a Question

The decision to certify a question of state law to a state supreme court is within the district court's discretion. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). "[U]se of the certification procedure is most appropriate when the question of state law is new or state law is unsettled." *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995). Furthermore, "[n]ovel or unsettled questions of state law may be appropriate for certification where certification will save time, energy and resources, or where there are conflicting federal interpretations of an important state law question which would otherwise evade state court review." *Metz v. Unizan Bank*, 416 F. Supp.2d 568, 574 (N.D. Ohio 2006) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997); *Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1060 (6th Cir. 1994)).

The Ohio Supreme Court has established the appropriate standard for certifying questions, specifying that (1) the question of Ohio law must be determinative of the proceeding, and (2) there must be no controlling Ohio Supreme Court precedent on the issue. Ohio Sup. Ct R. Prac. XVIII, Sec. 1. The preliminary question, therefore, is whether Defendants' proposed question is determinative of this

proceeding. The Court holds that, with modification, it is.

B. Procedural Due Process

Plaintiffs allege that they were denied due process of law when the county "took" body parts of their son. To ascertain whether Plaintiffs, in fact, have recourse for their alleged injury depends on whether they possess a right to their son's body parts that is afforded procedural due process protection. The Sixth Circuit has described the origin and nature of rights entitled to procedural due process, explaining that while the right itself is state-created, one's entitlement to pre-deprivation due process of that right is a federal matter:

> The touchstone of procedural due process is the fundamental requirement that an individual be given the opportunity to be heard "in a meaningful manner." *See Loudermill v. Cleveland Bd. of Educ.*, 721 F.2d 550, 563 (6th Cir.1983), aff'd, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Many procedural due process claims are grounded on violations of state-created rights . . . ; rights that do not enjoy constitutional standing. However, ***the right to a hearing prior to the deprivation is of constitutional stature and does not depend upon the nature of the right violated.*** The rationale for granting procedural protection to an interest that does not rise to the level of a fundamental right lies at the very heart of our constitutional democracy: the prevention of arbitrary use of government power.

Howard v. Grinage, 82 F.3d 1343, 1349 (6th Cir. 1996) (emphasis added); *see also Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1 (1978) (finding that "[a]lthough the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause" (*quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972))).

To this end, Plaintiffs are correct when they assert that "[t]he question of whether the interest recognized by Ohio law is a property right to which due process attaches is a federal question, not a state matter." (Doc. 61 at 1.) However, Plaintiffs' argument puts the cart before the horse, so to speak, because in resolving due process claims, "the existence of ***a 'protected' right*** must be the threshold determination." *Grinage*, 82 F.3d at 1350 (emphasis added). Specifically, Plaintiffs' assertion that the next of kin in Ohio have a "substantive interest in the remains of their deceased loved ones" (doc. 61 at 2), while generally correct, implies a broader protected right than that which applicable precedent likely intended. At issue here are not the remains of a decedent in general but specifically those body parts of a decedent that are removed and retained by a coroner for the purpose of forensic examination and testing.

The question of whether the state of Ohio has granted a decedent's family members rights in the individual parts of a dead body under certain circumstances is not one of first impression in this Circuit. The Sixth Circuit Court of Appeals has held that a plaintiff has a "legitimate claim of entitlement"

under Ohio law in her deceased husband's body, including his corneas, that is protected by the due process clause of the Fourteenth Amendment. *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991). The plaintiff in *Brotherton* sued the Hamilton County, Ohio coroner and others after she learned from her husband's autopsy report that the coroner had–without her consent–permitted her husband's corneas to be removed and used as anatomical gifts. *Id.* Having determined that the plaintiff's section 1983 claim depended upon her having a constitutionally protected property interest in her husband's corneas, the court went on to articulate the standard for determining whether an interest is entitled to due process protections. *Id.* at 479-80.

> Property interests protected by the due process clause must be more than abstract desires or attractions to a benefit. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). The due process clause only protects those interests to which one has a "legitimate claim of entitlement." *Id.* at 577, 92 S. Ct. at 2709. This has been defined to include "any significant property interests," *Boddie v. Connecticut*, 401 U.S. 371 at 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971), including statutory entitlements.

Id. at 480.

The *Brotherton* court then looked to Ohio law to determine whether the plaintiff's interest in her husband's corneas rose to the level of a "legitimate claim of entitlement" protected by the due process clause. The court's examination of state law revealed

that, while Ohio courts avoided characterizing the right in a dead body as a property right, they clearly acknowledged that a surviving custodian had "some interest" in the deceased, namely a "possessory right." *Id.* (discussing *Carney v. Knollwood Cemetery Ass'n*, 33 Ohio App. 3d 31, 514 N.E.2d 430 (1986) and *Everman v. Davis*, 54 Ohio App. 3d 119, 561 N.E.2d 547). Additionally, the court looked to the Ohio Anatomical Gift statute, Ohio Rev. Code § 2108.02(B), which grants a third-party survivor, under certain circumstances, the authority to make or decline to make anatomical gifts of the body parts of another, including corneas. *Id.* at 482. The court thus concluded that "the aggregate of rights granted by the state of Ohio to [the plaintiff] rises to the level of a 'legitimate claim of entitlement' in [the decedent's] body, including his corneas, protected by the due process clause of the fourteenth amendment."[3]

Not long after it decided *Brotherton*, the Sixth Circuit again considered a due process violation claim arising out of an autopsy. In *Montgomery v. County of Clinton*, No. 90-1940, 1991 WL 153071 (6th Cir. Aug. 9, 1991), the mother of a boy killed in a high-speed auto accident asserted that the autopsy done on her son, without her notice or consent, violated her due process rights. As a basis for her claim, the mother pointed to a Michigan statute which required the

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[3] Notably, the *Brotherton* court found that it did not need to determine whether the Supreme Court of Ohio would categorize a spouse's interest in the dead body as "property": "Although the existence of an interest may be a matter of state law, whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the due process clause is determined by federal law." *Id.* at 481-82.

medical examiner to use diligent effort to notify the next of kin prior to performing an autopsy. The *Montgomery* court distinguished *Brotherton* at least in part on the basis of the statute underlying the claim:

> There is no merit in the procedural due process claim founded on *the state statutory requirement* that the medical examiner make a diligent effort to notify the next of kin as to the decision to perform an autopsy. Whatever the nature of the right *created by the statute* there is an insufficient liberty or property interest under this statute to create a valid procedural due process claim. Although the notice requirement in the state statute does not appear to be discretionary, it does not purport to establish a right to control the dead body.

Id. at *2 (emphasis added).

In light of *Brotherton* and *Montgomery*, the threshold question in this due process claim is whether, under Ohio law, there exists for the next of kin of a decedent upon whom an autopsy has been performed "an interest" in the decedent's tissues and organs removed and retained by the coroner for forensic examination and testing. *Howard*, 82 F.3d at 1349. If so, then regardless of the nature of that "interest," it is a matter of federal law whether that interest rises to a level of a "legitimate claim of entitlement" protected by the Fourteenth Amendment. *Roth*, 408 U.S. at 577.

C. The State-Created Right

That Ohio law affords next of kin a protected right in the "body" of the decedent is beyond dispute.[4] However, this does not, as Plaintiffs suggest, automatically confer to the next of kin a protected right in "body parts" of a decedent removed and retained by the coroner for forensic examination and testing. This is highlighted by the recent enactment of Ohio Rev. Code § 313.123(B), which provides that "retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste and shall be disposed of in accordance with applicable federal and state laws." The only exception, stated in § 313.123(B)(2), is when "the coroner has reason to believe that the autopsy is contrary to the deceased person's religious beliefs," in which case "if the coroner removes any specimens from the body of the deceased person, the coroner shall return the specimens, as soon as is practicable, to the person who has the right to the disposition of the body." Arguably, if the Ohio legislature recognized a protected right in a decedent's tissues and organs

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[4] *See Carney*, 33 Ohio App. 3d at 37, 514 N.E.2d 430 (acknowledging a cause of action for mishandling of a dead body as a subspecies of the tort of infliction of emotional distress); *Everman*, 54 Ohio App. 3d at 122, 561 N.E.2d 547 (stating that "[t]here is no issue in this case of the possessory right of a spouse or other appropriate member of the family of a deceased for the purposes of preparation, mourning and burial"); *Biro v. Hartman Funeral Home*, 107 Ohio App. 3d 508, 512, 669 N.E.2d 65 (1995) (finding that the next of kin of the decedent had legal standing to maintain an action in tort for desecration of his father's remains); Ohio Rev. Code § 313.14 ("The next of kin, other relatives, or friends of the deceased person, in the order named, shall have prior right as to disposition of the body of such deceased person.").

removed and retained by the coroner for forensic examination, the statute would not confine return of the specimens to a religious decedent's next of kin.

As the Sixth Circuit made clear in *Whaley v. County of Tuscola*, decided four years after *Brotherton*, a federal court must consider the applicable state statutes before determining whether a person has a state-created protectable interest or entitlement. 58 F.3d 1111, 1115 (6th Cir. 1995) (discussing *Brotherton* and explaining that "[w]hen these Ohio cases, *and* the Ohio statute granting the next of kin the prior right to dispose of the body, *and* the Ohio Anatomical Act are taken together, it demonstrates that in Ohio there are existing 'rules and understandings' which grant the next of kin the right to dispose of the body by making a gift of it, to prevent others from damaging the body, and to possess the body for purposes of burial" (emphasis added)).

Given that any rights Plaintiffs may have in their son's body parts "are created and their dimensions . . . defined by existing rules or understandings that stem from an independent source such as state-law rules," this Court must consider the entire sphere of Ohio law touching upon the issue of proper handling of a deceased's body following an autopsy. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Accordingly, this Court simply may not ignore the recent enactment of Ohio Rev. Code § 313.123 and the potentially limiting effect it may have on the rights of persons in the intact remains of their loved ones. In any due process claim, "[r]esolution of the federal issue begins ... with a determination of what it is that state law provides." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 757 (2005). Thus, this Court cannot discern

whether Plaintiffs can pursue their § 1983 claim until it knows whether Ohio law provides the next of kin with a right to the decedent's tissues, organs, blood or other specimens removed and retained by the coroner for forensic examination and testing.

D. The Certified Question

The Court now must articulate the question that will be determinative of this proceeding–the first of the Ohio Supreme Court's two prerequisites to certification. It concludes that the proper question in this case is whether the next of kin of a decedent, upon whom an autopsy has been performed, have a "protected right" under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing. In other words, contrary to the position taken by the interested parties in their motions to certify, the question is not whether the next of kin have a "property interest" in the decedent's body parts. That is a question of federal law to be resolved after the preliminary determination of whether the state recognizes a protected right in the matter claimed. *See Town of Castle Rock*, 545 U.S. at 757. Additionally, the proper question concerns "the decedent's tissues, organs, blood or other body parts" and not just the brain and heart as Plaintiffs contend, because these terms generally parallel the language used in Ohio Rev. Code § 313.123 concerning disposal of specimens retained from an autopsy–which is the precise issue here.

As to the second certification criteria–whether there is controlling Ohio Supreme Court precedent on the issue–the answer is plainly that there is not. The

Ohio Supreme Court has never addressed the issue of whether next of kin have a protected right under Ohio law in the decedent's body parts removed and retained for forensic examination.

Finally, while the decision to certify a question to the state supreme court is discretionary, there is ample guidance that doing so under these circumstances is appropriate. As Judge Beckwith recognized in her consideration of these very issues in *Hainey*, "[t]his case presents difficult and emotional issues involving the coroner's statutory duty to perform autopsies, the retention of certain organs of the deceased for diagnostic purposes, [and] Plaintiffs' wishes to recover all of the remains and bury their loved ones in as complete a state as the circumstances of death will permit." *Hainey*, 2005 WL 2397704 at *1. Clearly, there are compelling interests on both sides of this scenario, and facts adduced in the *Hainey* case demonstrated that "the coroner's policy of not notifying the next-of-kin that he had retained the brains of their decedents was motivated by nothing more than a desire to avoid inflicting additional unnecessary pain on Plaintiffs." *Id.* at *5.[5]

This Court need not tread further down the path of presuming what rights Ohio affords next of kin with respect to their decedent's remains. Certainly this case presents "powerful considerations" supporting a

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[5] What's more, after the *Hainey* lawsuit was filed, the Hamilton County coroner's office began notifying the next of kin when it retained organs for examination, and testimony from the deputy coroners showed that in many cases, the next of kin ***would rather not know*** that the coroner had retained organs of the decedent. *Id.* at fn. 5.

district court's certification of a state law question prior to the disposition of a due process claim:

> First, principles of federalism and comity favor giving a State's high court the opportunity to answer important questions of state law, particularly when those questions implicate uniquely local matters . . . and might well require the weighing of policy considerations for their correct resolution. . . . Second, by certifying a potentially dispositive state-law issue, the Court would adhere to its wise policy of avoiding the unnecessary adjudication of difficult questions of constitutional law. . . . Third, certification would promote both judicial economy and fairness to the parties. After all, the [State] Supreme Court is the ultimate authority on the meaning of [State] law, and if in later litigation it should disagree with this Court's provisional state-law holding, our efforts will have been wasted . . . .

Castle Rock, 545 U.S. at 777 (Stevens, J., dissenting) (internal citations omitted). Given the important policy considerations at issue in this case, the fact that resolution of the state-law issue is potentially dispositive, and the prospect that a later state-court decision might render this Court's work a nullity, certification is the better course.

III. CONCLUSION

For the foregoing reasons, the Court GRANTS, with modification, the motions of Defendants and other interested parties to certify a question to the Ohio

Supreme Court. The question certified to the Ohio Supreme Court is as follows:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a protected right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

IT IS SO ORDERED.

s/Susan J. Dlott
Susan J. Dlott
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-3419

[Filed May 2, 2007]

In re: MARK ALBRECHT and DIANE ALBRECHT, Individually and on behalf of others similarly situated,	)
Petitioners.	)

ORDER

Before: KENNEDY, MOORE, and McKEAGUE, Circuit Judges.

The petitioners brought this action against a county coroner who performed an autopsy on their deceased son. They charge that the coroner removed and retained their son's brain, without notice to them or their permission, in violation of their constitutional rights. The petitioners sue on behalf of themselves and others in a similar position. They also seek to certify a defendant class composed of all Ohio county coroners.

Acting on motions made by the defendant and interested parties, the district court certified the following question to the Ohio Supreme Court:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a protected right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

The petitioners opposed certification and argued that this court had already decided the question in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991). They seek a writ of mandamus directing the district court to withdraw the certification or a writ of prohibition directing the district court not to consider any answer that the Ohio court might offer. They also move to stay the certification order. The defendants have responded in opposition to the motion to stay.

Mandamus is a drastic remedy and is reserved for extraordinary circumstances or to confines a lower court to the lawful exercise of its jurisdiction. *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382-385 (1953). There are several factors we consider when determining whether to grant the writ:

> (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired.
>
> (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first).
>
> (3) The district court's order is clearly erroneous as a matter of law.

(4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.

(5) The district court's order raises new and important problems, or issues of law of first impression.

In re Bendectin Products Liability Litigation, 749 F.2d 300, 304 (6th Cir. 1984). It is not required that every element be met; the factors may "be balanced in opposition to each other." *In re Chimenti*, 79 F.3d 534, 540 (6th Cir. 1996).

Although this circuit does not appear to have addressed the issue, other courts have held that an order granting or denying the certification of a question of law to a state court is not immediately appealable as a collateral matter. *Nemours Foundation v. Manganaro Corp., New England*, 878 F.2d 98 (3rd Cir. 1989) (certification of question of law to state court is not immediately appealable); *see also Brown v. Argosy Gambling Co., L.P.*, 360 F.3d 703, 705 (7th Cir. 2004) (denial of certification is not immediately appealable). However, the absence of an immediate appeal does not lead to automatic review by mandamus.

In general, "mandamus or prohibition should never be used as a substitute for appeal." *Application of Wilkinson Storage Corp.*, 776 F.2d 751 (6th Cir. 1983). The plaintiffs argue that an appeal will come too late because once the Ohio Supreme Court decides the issue, the matter will be at rest. We are not so convinced as to the course that this litigation will take. Ultimately, the district court must render a judgment

from which an appeal may be taken. That is, "the litigants will take whatever answer they receive from [the] state supreme court back to the federal district court to resolve the issues in the ongoing federal dispute." *Brown*, 360 F.3d at 705-06.

This case also is distinct from *Blasband v. Rales*, 979 F.2d 324 (3rd Cir. 1992), on which the plaintiffs rely in support of a writ. In *Blasband*, the district court certified a question of law that had been decided by the court of appeals in a prior appeal within the same case. The appeals court issued a writ directing the court to withdraw the certification order in order to enforce its own mandate and the law of the case. Here, the plaintiffs invoke a holding in a decision issued in another case on a distinguishable set of facts. Since *Brotherton* was decided, changes in Ohio law suggest another reading may be possible.

The plaintiffs also suggest that the district court erred by asking the Ohio Supreme Court whether there is a "protected" interest, rather than a "property" interest. Although the two terms generate some confusion, we are convinced that the district court recognized that there is a state component and a federal component to the plaintiffs' cause of action.

Upon review and consideration, the petition for a writ of mandamus and the motion to stay are **DENIED**. Fed. R. App. P. 21(b)(1).

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By /s/_____
Deputy Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 1:06cv274
DISTRICT JUDGE SUSAN J. DLOTT

[Filed March 16, 2007]

MARK ALBRECHT, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
BRIAN TREON, M.D., et al.,	)
	)
Defendants	)
	)

CERTIFICATION ORDER

Pursuant to Ohio Supreme Court Rule of Practice XVIII, the Court hereby issues this certification order to be served upon all parties or their counsel of record and filed with the Ohio Supreme Court.

A. CASE NAME

Mark Albrecht, et al. v. Brian Treon, M.D., et al., U.S. District Court, Southern District of Ohio, Case No. 1:06cv274.

B. STATEMENT OF THE CASE

1. FACTS

This lawsuit is a putative class action against all county coroners and/or medical examiners in the State of Ohio that have removed, retained, and disposed of body parts without prior notice to next of kin, and the County Commissions and Commissioners of those counties. Eighty-seven counties (all Ohio counties except Hamilton) are implicated in the suit. Plaintiffs Mark and Diane Albrecht brought this lawsuit against the coroner of Clermont County, Ohio, as well as the Board of County Commissioners, after discovering from their son's autopsy report that the coroner's office, or others on its behalf, had removed their son's brain for forensic examination and retained it after the autopsy. The coroner's office did not notify the Albrechts that their son's brain had been retained. The Albrechts thus buried their son without his brain and without any notice from the coroner of that fact. They allege they have suffered legal damages as a result.

2. CIRCUMSTANCES GIVING RISE TO THE QUESTION OF LAW

Plaintiffs allege that they were denied due process of law when the county "took" parts of their son's body. Before this Court can determine whether Plaintiffs were entitled to due process, it must ascertain whether

Ohio law affords them a protected right to their son's body parts that were removed and retained by the coroner for forensic testing. *Howard v. Grinage*, 82 F.3d 1343, 1350 (6th Cir. 1996) (explaining that "the existence of a 'protected' right must be the threshold determination" in resolving due process claims).

That Ohio law affords next of kin a protected right in the "body" of the decedent is beyond dispute.[1] However, this does not automatically confer to the next of kin a protected right in "body parts" of a decedent removed and retained by the coroner for forensic examination and testing. This is highlighted by the recent enactment of Ohio Rev. Code § 313.123(B), which provides that "retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste and shall be disposed of in accordance with applicable federal and state laws." The only exception, stated in § 313.123(B)(2), is when "the coroner has reason to believe that the autopsy is contrary to the deceased person's religious beliefs," in which case "if the coroner removes any specimens from the body of the deceased

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[1] *See Carney*, 33 Ohio App. 3d at 37, 514 N.E.2d 430 (acknowledging a cause of action for mishandling of a dead body as a subspecies of the tort of infliction of emotional distress); *Everman*, 54 Ohio App. 3d at 122, 561 N.E.2d 547 (stating that "[t]here is no issue in this case of the possessory right of a spouse or other appropriate member of the family of a deceased for the purposes of preparation, mourning and burial"); *Biro v. Hartman Funeral Home*, 107 Ohio App. 3d 508, 512, 669 N.E.2d 65 (1995) (finding that the next of kin of the decedent had legal standing to maintain an action in tort for desecration of his father's remains); Ohio Rev. Code § 313.14 ("The next of kin, other relatives, or friends of the deceased person, in the order named, shall have prior right as to disposition of the body of such deceased person.").

person, the coroner shall return the specimens, as soon as is practicable, to the person who has the right to the disposition of the body."

Arguably, if the Ohio legislature recognized a protected right in a decedent's tissues and organs removed and retained by the coroner for forensic examination, the statute would not confine return of the specimens to a religious decedent's next of kin. Thus, it appears that the recent enactment of Ohio Rev. Code § 313.123 may limit the rights of persons in the intact remains of their loved ones. In short, this Court cannot discern whether Plaintiffs can pursue their § 1983 claim concerning the coroner's removal and retention of their son's brain for forensic purposes until it knows whether Ohio law provides the next of kin with a right to the decedent's tissues, organs, blood or other specimens removed and retained by the coroner for forensic examination and testing.

3. THE QUESTION OF LAW TO BE ANSWERED

The question of law to be answered by the Ohio Supreme Court is as follows:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a protected right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

C. NAMES OF THE PARTIES

Plaintiffs:	Mark Albrecht and Diane Albrecht, *and on behalf of others similarly situated.*
Defendants:[2]	Brian Treon, M.D., Coroner of Clermont County, Ohio, *individually and in his official capacity and on behalf of others similarly situated.*
	Board of County Commissioners of Clermont County, Ohio *for itself and on behalf of others similarly situated*
	Mary Walker, *in her capacity as commissioner of Clermont County, Ohio, and on behalf of others similarly situated.*
	Bob Proud, in his capacity as commissioner of Clermont County,

---

[2] Plaintiffs seek to certify a defendant class of "all county coroners and/or medical examiners in the State of Ohio which have removed, retained, and disposed of body parts without prior notice to next of kin, and the County Commissions and Commissioners of those counties." However, this Court has not yet ruled on Plaintiffs' motion for class certification. Accordingly, the only named Defendants in the lawsuit are the Clermont County Coroner, Commission, and Commissioners. Every other Ohio county implicated by the lawsuit has retained counsel and has made an appearance in the District Court litigation as an interested party.

Ohio, and on behalf of others similarly situated.

Scott Croswell, *in his capacity as commissioner of Clermont County, Ohio, and on behalf of others similarly situated.*

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E. DESIGNATION OF THE MOVING PARTY

Defendants are the moving party.

RESPECTFULLY SUBMITTED.

s/Susan J. Dlott
Susan J. Dlott
United States District Judge

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No. 10-687

Supreme Court, U.S.
FILED
DEC 23 2010
OFFICE OF THE CLERK

In the Supreme Court of the United States

MARK ALBRECHT; DIANE ALBRECHT, Both individually and on behalf of others similarly situated,
Petitioners,

v.

BRIAN TREON, M.D., Individually and in his official capacity as Coroner of Clermont County, Ohio, and on behalf of others similarly situated; BOARD OF COUNTY COMMISSIONERS OF CLERMONT COUNTY, OHIO, for itself and on behalf of others similarly situated; MARY WALKER, in her capacity as commissioner of Clermont County, Ohio, and on behalf of others similarly situated; BOB PROUD, in his capacity as commissioner of Clermont County, Ohio, and on behalf of others similarly situated; SCOTT CROSWELL, in his capacity as commissioner of Clermont County, Ohio, and on behalf of other similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a decision by a state supreme court holding that the state has never recognized a property interest in autopsy specimens removed and retained by a coroner during the course of a statutorily-mandated, investigative autopsy undertaken pursuant to the police power of the state must be distinguished from a decision recognizing that next of kin have a property interest in organs subject to donation?

Whether a property right is properly established by state law as interpreted by the state's highest court?

Whether *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592 (2010) has any relevance to this matter where state law has never provided next of kin a property right in autopsy specimens?

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INTRODUCTION

Decrying the end of federalism as we know it will not make a silk purse out of Petitioners' sow's ear. This matter is a simple one of distinguishing one case -- the present one, involving the proper exercise of the police power of the county coroner to examine and retain body parts during the course of his investigation into cause of death -- from another -- one involving the private right of next of kin to authorize or decline to authorize organ donation.

The district court, finding that the question whether Petitioners had a property right in autopsy specimens, had not been answered by the Ohio Supreme Court interpreting Ohio law, agreed to certify it to the Ohio Supreme Court. In its response, the Ohio Supreme Court held that while Ohio law "give[s] next of kin the right to disposition of the body, that right does not arise until *after* the coroner has performed his duties and does not include forensic specimens that were retained by a coroner for forensic examination and testing." *Albrecht v. Treon*, 118 Ohio St. 3d 348, 357 (2008)(emphasis in the original).

Petitioners argue now, and have argued since the inception of the present case, that a 1991 decision of the Sixth Circuit Court of Appeals, *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), where the Court, interpreting Ohio's Uniform Anatomical Gift Act, found a private property right in organs subject to donation, controls the outcome of this case. Petitioners claim now that the Ohio Supreme Court and the Sixth Circuit have impermissibly overruled binding federal constitutional decisions, in particular *Brotherton*,

which, they allege, provide them with a legitimate claim of entitlement to these autopsy specimens.

There are significant problems with Petitioners' argument. First, *Brotherton* finds only a private right arising under Ohio's Uniform Anatomical Gift Act which permits next of kin to authorize or decline to authorize post-mortem organ donation. Next, Petitioners have failed to inform this Court that in the present case the Sixth Circuit has distinguished *Brotherton* on both its facts and applicable law from the present case where the facts involve a county coroner exercising his discretion with regard to how to perform an autopsy pursuant to a different set of Ohio statutes, and, finally, that no right offered by *Brotherton* has been implicated.

STATEMENT OF THE CASE

1. Proceedings below

On May 5, 2006, Petitioners filed their Complaint in this matter in the United States District Court for the Southern District of Ohio, Western Division (hereinafter "the Ohio case") as a putative plaintiffs' class action against a putative defendants' class of eighty-seven Ohio county coroners and boards of county commissioners. On January 28, 2008, subsequent to the filing of the Ohio case, Appellant's counsel filed a strikingly similar Complaint in the United States District Court for the Eastern District of Michigan, *Waeschle v. Dragovic, et al.*, Case No. 2:08-CV-10393 (hereinafter, "the Michigan case"). In both cases, the parties alleged a violation of their due process right to notice and an opportunity to be heard before deprivation of a property right -- autopsy

specimens from the bodies of their respective next of kin held by a coroner for study and disposal. In both complaints, the parties alleged that decisions of this Court clearly established that next of kin had a property interest in body parts of deceased relatives. In the Ohio case, the Albrechts asserted:

> The law in this area has been clearly established by the Sixth Circuit in *Brotherton v. Cleveland M.D.*, 923 F.2d 477 (1991), in which the Hamilton County Coroner's Office was a party. The Sixth Circuit held that family members do have a property interest in the body of their dead loved one which is protected by the Constitution and is enforceable pursuant to 28 U.S.C. Section 1983 [sic]. (Emphasis in the original.)

In the Michigan case, Waeschle asserted:

> The law in this area has been clearly established by the Sixth Circuit in *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir., 1995). The Sixth Circuit held that family members do have a property interest in the body of their dead loved one which is protected by the Constitution and is enforceable pursuant to 28 U.S.C. Section 1983 [sic].

In March 2007 the Ohio district court granted defendants' motion to certify the following question to the Ohio Supreme Court:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a property right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

Order Granting Motions to Certify, Case No. 1:06-CV-274, Pet'rs' App. E, p. 83a.

The Ohio Supreme Court accepted the question and on June 5, 2008, answered the question in the negative. *Albrecht v. Treon*, 118 Ohio St. 3d 348 (2008), Pet'rs' App. D, p. 37a.

In the Michigan case, in June 2008, the Medical Examiner filed a motion for summary judgment on the due process claim based upon the defense of qualified immunity. In the alternative, the Medical Examiner moved the district court to certify a question similar to that posed by the Ohio district court to the Michigan Supreme Court. The trial court in the Michigan case denied qualified immunity to the Medical Examiner and denied the Michigan defendants' motion to certify. Thereafter, in September 2008, the Medical Examiner filed an interlocutory appeal to the Sixth Circuit Court of Appeals.

In Ohio, the Clermont County defendants filed their Motion for Judgment on the Pleadings in October 2008. The trial court granted the defendants' Motion in May 2009. Thereafter, on June 12, 2009, the Albrechts timely filed their appeal to the Sixth Circuit Court of Appeals.

On August 14, 2009, the Sixth Circuit issued its decision on the appeal of the Michigan case, *Waeschle v. Dragovic*, 576 F.3d 539 (6th Cir. 2009), reversing the trial court's denial of immunity to the medical examiner and directing the trial court to certify the question of whether a property interest in autopsy specimens exists under Michigan law. Waeschle filed a petition for certiorari in this Court, Case No. 09-879, on January 21, 2010, which was denied on March 29, 2010.

On August 24, 2010, the Sixth Circuit issued its decision in the present case. Distinguishing *Brotherton v. Cleveland*, 923 F.2d 477 (1991) on its facts and applicable law, as it had in *Waeschle v. Dragovic*, the Sixth Circuit affirmed the trial court's dismissal of Petitioners' claims for the reason that they had no property interest in their son's brain and could not, therefore, support the first element of a due process clause claim. The Sixth Circuit affirmed, further, that where no property right in autopsy specimens exists, Petitioners were not deprived of a vested interest. Petitioners now seek this Court's review of the decision in *Albrecht v. Treon*, 617 F.3d 890 (6th Cir. 2010), Pet'rs' App. A, p. 1a.

2. Facts and issues

Petitioners' adult son died in an automobile accident in 2002. After his death, his body was taken by Respondent Clermont County Coroner, as required by Ohio law, for the performance of an autopsy to determine the cause of death. During the course of the autopsy, Respondent Coroner removed and retained Petitioners' son's brain. Petitioners were not informed by Respondent Coroner that he had retained the brain

or any other fluids, tissues or organs after completion of the autopsy. Accordingly, Petitioners buried their son without notice that his brain had been retained.

Petitioners do not assert that they did not receive the body of their son for burial. Nor do Petitioners assert that Respondents mishandled or in any way abused the corpse. They allege, instead, that the exigencies of a properly conducted forensic examination performed by a person lawfully authorized to do so resulted in their not receiving the *entire* body for burial. And, Petitioners assert, Respondents' failure to notify them that because of the dissection and removal and testing of blood, organs, fluids and tissue, they would not receive the entire body for burial, violated the Ohio law as interpreted by *Brotherton*, depriving them of a legitimate claim of entitlement to the forensic autopsy specimens.

It is Respondents' position, however, that *Brotherton* finds only a private right of next of kin to authorize or decline organ donation under Ohio's Uniform Anatomical Gift Act. *Brotherton*, does not, therefore, control the outcome of this case. Because property rights are determined by state law and because it determined that the legal issue involved had not been determined by the Ohio Supreme Court, the federal district court properly certified the question of whether next of kin have a legitimate claim of entitlement to autopsy specimens resulting from a forensic examination of a body to the Ohio Supreme Court. When the Ohio Supreme Court, distinguishing the *Brotherton* holding, determined that no such right exists, either at the time of its decision or at any time in the past, the Sixth Circuit properly affirmed dismissal of this case.

REASONS FOR DENYING THE PETITION

1. The courts below, including the Ohio Supreme Court, have reviewed the present case and have held, consistently, that significant distinctions exist between the facts and applicable law relevant to the present case and those in the decisions Petitioners claim to be controlling.

In 2007, when Respondents filed a motion requesting the district court was to certify the question of Ohio property law to the Ohio Supreme Court, the district court, in granting the motion, cited *Brotherton* for the well-settled proposition that property rights are created by "an independent source such as state law." Order Granting Motions to Certify, *Albrecht v. Treon*, Case No. 1:06-CV-274, p. 4, Pet'rs' App. E, p. 74a (hereinafter "Order"), citing *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1 (1978), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Most recently, in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592 (2010), this Court stated "Generally speaking, state law defines property interests ...."

Further, in its Order granting Respondents' Motion to Certify, the district court relied on *Brotherton* to set forth the "standard for determining whether an interest is entitled to due process protections." Order, p. 6, Pet'rs' App. E, p. 75a, quoting *Brotherton v. Cleveland*, 923 F.2d 477, 480. In articulating this standard, the *Brotherton* court cited to well-settled decisions of this Court:

> Property interests protected by the due process clause must be more than abstract desires or attractions to a benefit. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The due process clause only protects those interests to which one has a "legitimate claim of entitlement." *Id.* at 577, 92 S.Ct. at 2709. This has been defined to include " 'any significant property interests,' *Boddie v. Connecticut*, 401 U.S., 371 at 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971), including statutory entitlements.

Id.

Before granting the motion to certify, the district court, however, distinguished the facts informing the present case from those alleged in *Brotherton* as well as citing the differing statutes law applicable to the two matters. First, the district court noted: "The plaintiff in *Brotherton* sued the Hamilton County, Ohio, coroner and others after she learned from her husband's autopsy report that the coroner had – without her consent – permitted her husband's corneas to be removed and used as anatomical gifts." *Id.* at p. 5, Pet'rs' App. E, p. 75a, citing, *Brotherton v. Cleveland*, 923 F.2d at 479-80. The district court noted further that the *Brotherton* decision relied on Ohio's Uniform Anatomical Gift Act, specifically Ohio Revised Code section 2108.02(B), "which grants a third-party survivor, under certain circumstances, the authority to make or decline to make anatomical gifts of body parts to another." *Id.* at p. 6, Pet'rs' App. E, p. 76a, citing *Brotherton v. Cleveland*, 923 F.2d at 482.

At the same time, the district court looked to a decision of the Sixth Circuit, *Montgomery v. County of Clinton*, 940 F.2d 661 (6th Cir. 1991). Although unpublished, *Montgomery* involved the right of a county coroner to perform an autopsy against the wishes of next of kin. There the Sixth Circuit distinguished *Brotherton* as offering a private right in organ donation as opposed to the right of a county coroner to use his discretion as to whether an investigative autopsy would be performed. According to the Sixth Circuit,

> There is no merit in the procedural due process claim founded on the state statutory requirement that the medical examiner make a diligent effort to notify the next of kin as to the decision to perform an autopsy. Whatever the nature of the right created by the statute there is an insufficient liberty or property interest under this statute to create a valid procedural due process claim. Although the notice requirement in the state statute does not appear to be discretionary, it does not purport to establish a right to control the dead body. We would distinguish this case from *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991). In *Brotherton* the plaintiff had an "aggregate of rights granted by the state of Ohio" to control disposition of the body, including the corneas, and thus had a right to refuse removal of corneas for purposes of a cornea transplant. *Id.* at 482. In this case, the state left the decision as to autopsy to the discretion of

> the medical examiner, allowing the autopsy with or without the permission of the next of kin.[1]

Montgomery v. County of Clinton, 940 F.2d 661.

Noting that the Sixth Circuit itself distinguished *Brotherton*, which involved the private right to direct or decline organ donation, from *Montgomery*, "at least in part on the basis of the statute underlying the claim," in granting Respondents' Motion to Certify, the district court held that "the threshold issue in this due process claim is whether, under Ohio law, there exists for the next of kin of a decedent upon whom an autopsy has been performed 'an interest' in the decedent's tissues and organs removed and retained by the coroner for forensic examination and testing." Order, p. 7, Pet'rs' App. E, p. 77a.

Thereafter, the district court certified the following question to the Ohio Supreme Court:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a protected right under Ohio law in the decedent's tissues,

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[1] While the Sixth Circuit does not consider an unpublished case to be binding precedent, it will consider such a case to be persuasive. *Longaberger Co. v. Kolt*, 586 F.3d 459, 468 (6th Cir. 2009). Accordingly, while *Montgomery* is not binding, it did reveal to the district court that as early as 1991, the Sixth Circuit considered the private right set forth in *Brotherton* to be distinct from that asserted by the county coroner performing an investigative autopsy in *Montgomery*. *Montgomery*, 940 F.2d 661 (6th Cir. 1991).

> organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

Id. at p. 10, Pet'rs' App. E, p. 83a.

In response, the Ohio Supreme Court held:

> [T]he next of kin of a decedent upon whom an autopsy has been performed do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the corner for forensic examination and testing.

Albrecht v. Treon, 118 Ohio St. 3d 348, 358 (2008), Pet'rs' App. D, p. 37a.

Given that state law is the only indicator of what defines a property right, when there is no precedent upon which to rely to determine a particular matter rises to the level of property right, the only avenue is to inquire with the state's highest court. The mechanism provided for by law to make such inquiry is certification of the question of state law to a state supreme court. When, as in this case, the question is one of first impression, the decision to certify[2] a question of state law to a state supreme court is within the federal district court's discretion. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Even the *Stop the*

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[2] Ohio Supreme Court Rule of Practice XVIII was adopted as effective on June 1, 1994. Ohio Sup. Ct. R. Prac. XVIII.

Beach Renourishment, Inc. case upon which Petitioners lean heavily for support of their argument, exhibits the mechanism of certification of an unanswered state law question to a state's highest court. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2595 (2010).

2. The Ohio Supreme Court's clarification of a question of property law regarding specimens from a forensic autopsy in the present case did not eliminate the legitimate claim of entitlement of an individual or next of kin to decide whether to donate organs under the Uniform Anatomical Gift Act.

In reaching its conclusion, the Ohio Supreme Court, as did the federal district court, distinguished *Brotherton* from the facts and law involved in the present case. According to the Ohio Supreme Court,

> The *Brotherton* court, in examining [Ohio] R[evised].C[ode]. 2108.02(B), which governs who may make anatomical gifts of a decedent's body parts, concluded that "[a]lthough extremely regulated, in sum, these rights [possessory right and the right to have the body remain undisturbed] form a substantial interest in the dead body, regardless of Ohio's classification of that interest." *Brotherton*, 923 F.2d at 482. Thus, the court held that the "aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body, including his

> corneas, protected by the due process clause of the fourteenth amendment." *Id.*

Albrecht v. Treon, 118 Ohio St.3d at 352, Pet'rs' App. D, p. 44a.

The Ohio Supreme Court next analyzed statutes found in Chapter 313 of the Ohio Revised Code, those governing the powers and duties of county coroners, noting that "A coroner's forensic examination is a classic function of the police power of the state. Many times, autopsy specimens and the results of the forensic examination are essential evidence in the prosecution of a crime. Sometimes, autopsy specimens must be preserved for long periods of time." *Albrecht v. Treon*, 118 Ohio St.3d, at 355, Pet'rs' App. D, p. 49a.

Acknowledging that R.C. 313.123, enacted in 2006, and which specifically designated autopsy specimens to be medical waste and authorizing the coroner to dispose of them as such, did not apply to Petitioners' claim, the Ohio Supreme Court nevertheless found that other statutes of long standing supported its finding that individuals have no property right in autopsy specimens. For example,

> 'When any person dies as a result of criminal or other violent means, by casualty, by suicide, or in any suspicious or unusual manner, when any person, including a child under two years of age, dies suddenly when in apparent good health, or when any mentally retarded person or developmentally disabled person dies regardless of the circumstances,' the coroner must be

> immediately notified by the attending physician or law enforcement agency that obtains knowledge thereof. R.C. 313.12.

Id., Pet'rs' App. D, p. 49a. In addition, the Ohio Supreme Court noted:

> [p]ursuant to R.C. 313.121, if a child under two years of age dies suddenly when in apparent good health, the death must be reported immediately to the coroner, and, with certain exceptions, the coroner or deputy coroner must perform an autopsy on the child. In accordance with R.C. 313.121 and 313.131, the coroner may decide not to perform an autopsy on the child if the coroner has reason to believe it would be against the religious beliefs of the child's parents. However, the coroner is authorized under both sections to perform the autopsy in spite of those religious beliefs when the coroner concludes that the autopsy is a compelling public necessity. R.C. 313.131. Further, the Ohio Administrative Code mandates that coroners retain the brain and other specimens resulting from the autopsy of a child under two for a period of at least six months when warranted by the circumstances. Ohio Administrative Code 3701-5-14(B)(6).

Id. at 355-56, Pet'rs' App. D, pp. 49a-50a.

The Ohio Supreme Court further addressed the question of the temporal scope of its holding with respect to a property right in autopsy specimens. "Even before R.C. 313.123 was enacted [in 2006], a deceased's next of kin had no protected right in autopsy specimens pursuant to Ohio statutes." *Albrecht v. Treon*, 118 Ohio St.3d at 355, Pet'rs' App. D, p. 49a. In support of that holding the Ohio Supreme Court thereafter engaged in an exhaustive analysis of Ohio law found in Chapter 313 of the Ohio Revised Code in effect in 1991 governing the conduct of coroners. The Court concluded: "Thus, while R.C. 313.14 gives next of kin a right to disposition of the body, that right does not arise until *after* the coroner has performed his duties, and does not include forensic specimens that were retained by a coroner for forensic examination and testing." *Id.* at 357, Pet'rs' App. D, p. 52a (emphasis in the original).

Petitioners insist, nevertheless, that the Ohio Supreme Court changed Ohio law by "overruling" *Brotherton*. The Ohio Supreme Court stated, in this regard:

> *Brotherton*, however, involved R.C. Chapter 2108, the Anatomical Gift Act, as it related to removal of corneas from autopsy subjects for use by eye banks. Thus, *Brotherton's* specific holding regarding removal of corneas for purposes unrelated to the autopsy is not relevant in this case.

Id. at 352, Pet'rs' App. D, p. 44a.

Accordingly, the Ohio Supreme Court found that a protected interest in autopsy specimens retained for forensic examination and testing has never existed in Ohio. Petitioners' argument notwithstanding, the Ohio Supreme Court's response to the question certified to it by the district court does not involve or even implicate the private right to authorize or decline voluntary organ donation and does not, therefore, result in an unlawful "retroactive" application of Ohio law.

Having received this response, the federal district court dismissed Petitioners' claims, and the Sixth Circuit affirmed. *Albrecht v. Treon*, 617 F.3d 890 (6th Cir. 2010), Pet'rs' App. A, p. 1a. It is from this decision that Petitioners filed their petition to this Court.

As an initial matter, the Sixth Circuit's decision in *Albrecht v. Treon*, addresses Petitioners' ongoing lament that *Brotherton* governs the outcome of their lawsuit against Respondents. "At issue in *Brotherton*, however, was part of Ohio's adoption of the Uniform Anatomical Gift Act, which expressly granted next of kin the right to dispose of a relative's remains." The Sixth Circuit noted, "There is no similar statute at issue in this case." *Albrecht v. Treon*, 617 F.3d 890, 894, FN1 (6th Cir. 2010), Pet'rs' App. A, pp. 6a-7a.

Specifically, in *Brotherton* the Sixth Circuit held:

> OHIO REV. CODE § 2108.02(B), as part of the Uniform Anatomical Gift Act governing gifts of organs and tissues for research or transplants, expressly grants a right to Deborah Brotherton to control the disposal of Steven Brotherton's body.

> * * * * Although extremely regulated, in sum, these rights form a substantial interest in the dead body, regardless of Ohio's classification of that interest. We hold the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment.

Brotherton, 923 F.2d at 482.

Brotherton clearly acknowledges that the rights granted by the state of Ohio arise under the Uniform Anatomical Gift Act, Ohio Revised Code section 2108.01, *et seq.*, and holds further that the rights in question are "extremely regulated." Yet, even Ohio's Uniform Anatomical Gift Act in effect in 1991 at the time *Brotherton* was decided gave the coroner prior right to organs otherwise subject to donation.

> The rights of the donee created by the anatomical gift are paramount to the rights of others **except that a coroner** or, in the coroner's absence, a deputy coroner, **who has, under section 313.13 of the Revised Code, taken charge of the decedent's dead body and decided that an autopsy is necessary, has a right to the dead**

> **body and any part that is paramount to the rights of the donee.**

Ohio Revised Code Section 2108.02(E)(emphasis supplied).

The Sixth Circuit also noted that "the argument that *Albrecht* [*v. Treon*, 118 Ohio St.3d 348 (2008)] impermissibly 'overrules' and conflicts with *Brotherton* is flawed. *Brotherton* is distinguishable from the facts in this case ...." *Albrecht v. Treon*, 617 F.3d at 896, Pet'rs' App. A, p. 12a. Citing to its earlier decision in *Waeschle v. Dragovic*, 576 F.3d 539 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 2063 (2010), the Sixth Circuit stated:

> *Brotherton* and *Whaley*, however, are distinguishable from the present case. The key difference is that the brain of Waeschle's mother was removed and retained for study by the Medical Examiner in furtherance of a lawful criminal investigation. By contrast, the removal of corneas in *Brotherton* and *Whaley* served no investigative function whatsoever. The distinction is important because Waeschle might have no right under Michigan law to possess, control, or dispose of her mother's brain once it is removed for legitimate forensic study.

Albrecht v. Treon, 617 F.3d at 897, *quoting Waeschle v. Dragovic*, 576 F.3d at 546-47, Pet'rs' App. A, p. 13a.

Accordingly, the Sixth Circuit held, "this Court and the Supreme Court of Ohio agree that *Brotherton*

applies only in the narrow circumstance of unauthorized removal of body parts for donations ...." *Id.*, Pet'rs' App. A, p. 13a.

Having distinguished *Brotherton* from the present case and determined that *Brotherton* is neither factually or legally similar, the Sixth Circuit addressed Petitioners' argument that their alleged rights under *Brotherton* allegedly "vested" in 2002, the time of the autopsy at issue, an event which occurred prior to the Ohio Supreme Court's 2008 answer to the district court's certified question.

The Sixth Circuit's holding in this regard need not be embellished and cannot be improved upon:

> As explained above, this Court does not define Ohio property law. *Brotherton* did not create a property interest in the next of kin's deceased relative's corneas, but, instead, interpreted that right as it already existed pursuant to Ohio's Uniform Anatomical Gift Act. *Brotherton* is distinguishable from this case and does not control the outcome, therefore, *Albrecht* [*v. Treon*, 118 Ohio St.3d 348 (2008)] did not impact the law as set forth in *Brotherton*. Thus, the question of whether *Albrecht* [*v. Treon*, 118 Ohio St.3d 348 (2008)] should be applied retrospectively or prospectively is inapposite here because ***Albrecht*** [*v.*

> *Treon*, 118 Ohio St.3d 348 (2008)] **did not change Ohio law**.

Id. at 898, Pet'rs' App. A, pp. 15a-16a (emphasis supplied).

A review of the facts of this case and the applicable law, a review performed at length and in depth by the federal district court, the Ohio Supreme Court and the Sixth Circuit Court of Appeals, demonstrates that Petitioners' arguments are unavailing.

3. In the absence of a state-defined property right in forensic autopsy specimens, this Court's decision in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592 (2010) is irrelevant to this matter.

Petitioners' entire argument is based on the incorrect assumption that *Brotherton* was controlling authority for this case. This is an entirely flawed premise from both a procedural and a substantive standpoint. As to procedure, not a single court in this case's history has held that *Brotherton* was the applicable law. Every court (United States District Court, Ohio Supreme Court, Sixth Circuit Court of Appeals) has held that *Brotherton* is distinguishable and does not apply to the facts and legal issues presented by this case. Thus, from a purely procedural standpoint, Petitioners' argument that a vested right has been unlawfully taken away, is based solely on their own interpretation of Ohio law as well as a convoluted attempt to demonstrate that this Court should perform a *Stop the Beach* analysis.

In actuality, petitioners are asking this Court to simply overrule the Sixth Circuit Court of Appeals, determine that *Brotherton* is applicable, and not distinguishable. This substantive analysis is where petitioners' appeal falls short of constitutional analysis. This is not a case of a vested property right being taken away by a Court's ruling, this is a case distinguishable by facts and by statutes from *Brotherton*, and every court in the two class action suits filed by Petitioners' attorneys in Ohio and in Michigan has held that the facts presented here are simply completely distinguishable:

Albrecht:

Supreme Court of Ohio
United States District Court
Sixth Circuit Court of Appeals

Waeschle:

United States District Court
Sixth Circuit Court of Appeals
United States Supreme Court (denial of petition)
Michigan Supreme Court

Brotherton cannot, as a matter of law and common sense, be controlling authority over a case that involves both different facts and different statutes, and these distinctions are at the heart of all of the cases above. Although there is not a bright line standard for controlling/distinguishing authority, and not much

case law to explain the concept, a different set of facts or a different law distinguishes a case.[3]

A different set of facts or different law distinguishes a case. Here, both the facts and statutes applicable to *Brotherton* and the present case are different, and this case is thus distinguished from that upon which Petitioners rely. Accordingly, *Brotherton* could not have and did not create a "vested" property interest in facts and statutes which were not at issue in *Brotherton*.

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[3] While not directly on point, the following cases establish the parameters of controlling versus distinguishable authority. A prior case "is controlling only in a similar factual situation. Here the facts are clearly distinguishable." *Solem v. Helm*, 463 U.S. 277, 303 (1983) (reversed on other grounds). Essentially, "... a rule is controlling only if it matches the case before the court both 'as to law and fact,' and most cases are distinguishable in some respect." *Williams v. Taylor*, 529 U.S. 362, 377 (2000).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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